

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the Matter of:

The Digital Performance Right  
in Sound Recordings and  
Ephemeral Recordings

(Webcasting Rate Adjustment  
Proceeding)

Docket No.  
2005-1 CRB DTRA

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Volume 35

Room LM-414  
Library of Congress  
First Street and  
Independence Avenue, S.E.  
Washington, D.C. 20540

Wednesday,  
November 6, 2006

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

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## I N D E X

## WITNESS DIRECT CROSS REDIRECT RECROSS

Christine Winston 15  
 by Mr. Taylor 38  
 by Mr. Handzo 40

N. Mark Lam 75 151  
 by Mr. Smith 103 160

## EXHIBITS IDENTIFIED RECEIVED

## SoundExchange:

SX 136 (current AOL Web page 49 --  
 SX 137 (AOL radio player screen) 56 60  
 SX 138 (PowerPoint presentation) 61 --  
 SX 139 (summary, agreement AOL/XM) 66 67  
 (Under protective order

SX 140 (amended testimony, 106 --  
 Dr. Brynjolfsson)

No. 141 (Live365 monthly report) 131  
 (Under protective order, marked  
 in closed session)

No. 142 (Live365 ad presentation 143 --  
 No. 143 (undescribed) 148 --

1 very hard for us to get witnesses here during  
 2 that week. But I don't know if that is an  
 3 issue that the Board had given any thought to  
 4 at this point.

5 CHIEF JUDGE SLEDGE: It is not.  
 6 We are presently scheduled to be here the full  
 7 week of Thanksgiving. So anything that you  
 8 all want to do to change that, please file  
 9 that in writing.

10 MR. HANDZO: We will do that.

11 JUDGE ROBERTS: Mr. Handzo, we  
 12 were planning to hand out Swanson turkey  
 13 dinners on Thanksgiving, if that helps at all.

14 MR. HANDZO: To be honest, it  
 15 doesn't help much.

16 JUDGE ROBERTS: Yes, I didn't  
 17 think so.

18 CHIEF JUDGE SLEDGE: One other  
 19 point on that. Prior to us agreeing to your  
 20 request on moving these hearings, we have  
 21 scheduled a two-hour hearing Wednesday  
 22 afternoon beginning at 1:30. So Wednesday

## P-R-O-C-E-E-D-I-N-G-S

Time: 9:32 a.m.

CHIEF JUDGE SLEDGE: Good morning.

We will return to order. Counsel, you are at  
 the podium.

MR. HANDZO: I am, Your Honor. I  
 have one preliminary matter that I would like  
 to raise with the Board.

CHIEF JUDGE SLEDGE: Yes?

MR. HANDZO: That is a question  
 about the Board's schedule. The parties  
 wanted to request of the Board that we not be  
 in trial during the week of Thanksgiving. I  
 assume that we will get through DiMA's case  
 this week, the Broadcasters' case next week,  
 and then we are into the week of Thanksgiving.

I think last time around the Board  
 took the week off during the Fourth of July  
 holiday. We, I think, request the same thing  
 this time around for Thanksgiving, partly to  
 accommodate the vacation plans of the Council,  
 but also, I suspect, because it is going to be

afternoon we will have to be in recess from  
 1:30 to 3:30, which I realize from getting  
 your witness list, that that will be probably  
 the worst day of the week for you of this  
 week, but that's been set a good long while in  
 a DAT's claim hearing that we thought was  
 going to be in third week of testimony and,  
 therefore, very little interference with you,  
 but then you changed us on that. So it being  
 in the first week is more problematic, I'm  
 sure.

MR. HANDZO: One other question,  
 Your Honor. Are we following the same  
 schedule this time around in terms of going  
 four days a week and taking Friday off?

CHIEF JUDGE SLEDGE: Yes.

MR. HANDZO: Thank you.

CHIEF JUDGE SLEDGE: Really, that  
 seems unfortunate as far as progress, but I  
 know it is -- from my perspective, it is just  
 imperative to have that day to catch up, and  
 I suspect it is probably very useful to you,

1 too.

2 MR. HANDZO: Yes.

3 MR. STEINTHAL: Your Honor, at  
4 this time just on the scheduling, the  
5 Thanksgiving week for me is a little bit  
6 different than everybody else. I understand  
7 the issue with respect to scheduling of the  
8 witnesses.

9 I am currently -- There is another  
10 case about to go to trial in the U.K., and I  
11 am trying to balance a proceeding before the  
12 U.K. Copyright Tribunal which was suddenly  
13 adjourned when four of the seven parties  
14 settled, but that is -- There is a lot of  
15 pressure from the Tribunal there as to what is  
16 happening here, and what I have told the  
17 Tribunal there is, if Thanksgiving week is  
18 off, and if we don't settle -- and I will  
19 report to the Board, there still are  
20 discussions, and they may or may not bear  
21 fruit, but it is not as if -- We did close  
22 ourselves in a room on the day that we were

1 here, and then I would come back from the U.K.  
2 and be here for the week after Thanksgiving  
3 when SoundExchange puts its witnesses on.

4 So I've got that extra  
5 complicating factor, I'm afraid, and to the  
6 extent we can get some feedback from the  
7 panel, the sooner the better.

8 CHIEF JUDGE SLEDGE: We will do  
9 that. We will give you an answer as quickly  
10 as possible. Frankly, one of the big factors  
11 we will be considering is how much credibility  
12 we have in your assurance that we will be  
13 through with all testimony by the end of  
14 November and how much assurance we are  
15 comfortable with that so that we can begin the  
16 final stages and getting the matters from you  
17 in a timely way in December so that we have  
18 everything completed and begin writing by mid-  
19 December will affect how we do.

20 That's a tight schedule. Frankly,  
21 we don't know how we can get our current  
22 matters pressing on us done if we don't start

1 ordered to do so, and have had a number of  
2 discussions since then. We are just not at  
3 the point where we can announce anything. So  
4 I won't. But the U.K. Tribunal matter does  
5 cause a problem for me, in that I have got to  
6 report to the Tribunal, because I told the  
7 Tribunal hearing that this request was going  
8 to be made, that what I would be prepared to  
9 do is be here this week, allow myself to start  
10 the trial in the U.K. next week when the  
11 broadcasters and small webcasters are putting  
12 their witnesses on, and Mr. Larson can cover.

13 Then thinking that Thanksgiving  
14 week would be an off week based on what all  
15 the parties had talked about, I didn't commit  
16 to the Tribunal in the U.K. I said that we  
17 would be raising this with you this morning so  
18 that, if we were going to get Thanksgiving  
19 week off, I could report to the Chairman of  
20 the Tribunal there that I would have a two-  
21 week period starting next week through  
22 Thanksgiving week where I didn't need to be

1 writing in December.

2 MR. STEINTHAL: I think we are  
3 pretty confident, and I am prepared to say  
4 this -- I know people are going to chuckle,  
5 but we are pretty confident that we are going  
6 to get through the witnesses on the service  
7 side within the first two weeks. So that if  
8 we do take Thanksgiving off, we will come  
9 right back with the SoundExchange case right  
10 after Thanksgiving.

11 CHIEF JUDGE SLEDGE: That doesn't  
12 meet the goal that I just outlined.

13 MR. HANDZO: Well, we will take a  
14 look at the schedule, Your Honor, and see what  
15 we can do to meet that schedule.

16 CHIEF JUDGE SLEDGE: I know you  
17 all will want a fair amount of time in  
18 preparing your proposed findings and  
19 conclusions, and I know that is very important  
20 to us, and that will be what we need to start  
21 writing.

22 MR. STEINTHAL: Some of that can

1 be done while we are in hiatus, too. We don't  
2 have to wait until all the evidence is in to  
3 be drafting, when we know that 80 percent of  
4 the record is already in.

5 MR. HANDZO: I will say, I don't  
6 think that -- The last day of the trial is not  
7 going to be when we start writing our findings  
8 of facts. I don't think that is going to  
9 affect when we can get those to you, if that  
10 is sort of the operative date that we are  
11 driving off of.

12 CHIEF JUDGE SLEDGE: But also  
13 think about in this discussion that we are now  
14 starting -- what? -- two to three weeks after  
15 we had expected to start. So that doesn't  
16 leave us much leeway or much flexibility.

17 MR. JOSEPH: Your Honor, for  
18 scheduling purposes, on Wednesday, as I think  
19 was indicated in the letter, we had planned to  
20 put on Professor Jaffe. That is the one day  
21 that, as far as we can tell, he is available.  
22 I just wanted to check for scheduling purposes

1 you tell us before we get into the details  
2 your current title at AOL?

3 A Yes. I am Vice President of  
4 Finance, responsible for metrics and strategic  
5 analysis.

6 Q And is that a change from when you  
7 were here before and testified?

8 A It is a change in my title. I  
9 have been promoted, but my responsibilities  
10 remain largely the same.

11 Q Okay. And can you just remind us  
12 of what your responsibilities are in your  
13 position?

14 A Sure. I am responsible for  
15 analysis and reporting on all of the metrics  
16 for AOL services, including music and radio,  
17 as well as in strategic analysis and  
18 forecasting for the business.

19 Q And does your position still  
20 entail finances and accounting related to  
21 royalties that are paid?

22 A Yes, it does.

1 if the court would be willing to run a little  
2 bit late on that day, if we need to, to get  
3 him done.

4 CHIEF JUDGE SLEDGE: Yes.

5 MR. JOSEPH: Thank you.

6 CHIEF JUDGE SLEDGE: I guess the  
7 operative question is "little."

8 MR. JOSEPH: Excuse me.

9 CHIEF JUDGE SLEDGE: The operative  
10 question would be "a little."

11 MR. JOSEPH: Understood.

12 MR. LARSON: Your Honor, DiMA  
13 calls as its first witness Christine Winston.  
14 WHEREUPON,

15 CHRISTINE WINSTON  
16 was called as a witness by counsel for Digital  
17 Media Assoc (DiMA), and having first been duly  
18 sworn, assumed the witness stand, was examined  
19 and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. LARSON:

22 Q Ms. Winston, welcome back. Could

1 Q Now if I could direct your  
2 attention to your statement there in front of  
3 you, I see the first section of your statement  
4 is titled "In-stream Audio Advertisements in  
5 AOL's Broadband Radio Products."

6 A Yes.

7 Q Can you just again refresh our  
8 recollection as to what the AOL broadband  
9 radio product is?

10 A Yes. AOL offered to its broadband  
11 subscribers a higher fidelity product that,  
12 for a period of time, did not include in-  
13 stream advertisements and included some  
14 additional programming from our partner, XM.

15 Q And just generally, how was that  
16 product made available to users?

17 A It is made available through the -  
18 - was made available through the AOL client  
19 software to subscribers.

20 Q When you say through the AOL  
21 client software?

22 A It is a specific program that

1 allowed people to access their AOL e-mail and  
2 various other products, with virus protection  
3 and things of that nature.

4 Q Now I understand then from what  
5 you have said that there is a change related  
6 to the advertisements in this product?

7 A Yes. As I indicated when I was  
8 here last, we have added in-stream audio  
9 advertisements to that product. They were  
10 added in the middle of June, on the 19th,  
11 which I think was just after or during my last  
12 testimony here. So the broadband radio  
13 product now carries advertisements, just as  
14 our free radio product did.

15 Q Were you involved with the  
16 decision to place advertising in that product?

17 A Yes. It was a very simply made  
18 decision. We had come to a point where our  
19 sell through rates on the existing radio  
20 products that carried audio ads were trending  
21 upward of 80 percent. So as marketplace  
22 demand started to fill out the inventory we

1 already had, we added more inventory by  
2 placing ads in the broadband product.

3 Q Can you just tell us generally,  
4 why is this change part of your rebuttal  
5 testimony here?

6 A It is part of my testimony,  
7 because in Professor Brynjolfsson's statement  
8 and his analysis and findings, he mentions  
9 that we did not have advertising in this  
10 product and that we were in some way  
11 intentionally leaving money on the table by  
12 making this product ad-free, when in reality  
13 we were never sold out on the advertisements  
14 that we had in the existing products that  
15 carried audio advertising.

16 When we did get to a closer to  
17 sold out situation on that product, we added  
18 inventory to the free product or, in this  
19 case, we added the advertising to the  
20 broadband product.

21 Q Now let me just point your  
22 attention. In the bottom of Paragraph 3, you

1 talk about the task of determining what  
2 allocated portion -- what that allocated  
3 portion would actually be when users pay a  
4 single price for broadband Internet access.

5 A Sure.

6 Q Can you just explain to us what  
7 you were talking about?

8 A Yes. There has been some  
9 discussion in this proceeding of whether radio  
10 added some kind of benefit to consumers who  
11 were paying AOL a monthly fee for their  
12 broadband subscription, and there really is no  
13 way, when we have a bundled product that  
14 includes many things such as continued access  
15 to your AOL e-mail and virus protection and  
16 SPAM protection and other content and  
17 programming, to pinpoint an exact amount of  
18 that subscription fee that one might attribute  
19 to radio, since, first, not every subscriber  
20 uses radio and, even if those who do, with a  
21 bundled price plan that doesn't offer things  
22 a la carte for subscription, it is very

1 difficult to determine what the value for that  
2 might be.

3 I had in my original statement  
4 suggested a method for imputing a means by  
5 which to pay a revenue share to the labels for  
6 the broadband product, which was to look at  
7 the total listening hours on the broadband  
8 product relative to the total listening hours  
9 on the narrow band product, and look at the  
10 revenue on the narrow band product and pay a  
11 pro rata revenue share based on the total  
12 listening hours between the two. So --

13 Q Let me just jump in there for a  
14 second, just so we are all clear, because it  
15 has been a while since we have been here.

16 When you mentioned the narrow band  
17 product, can you just tell us what that is?

18 A That would be the product that  
19 carried audio advertising, has always carried  
20 audio advertising since we started working  
21 with Ronning Lipset. That was both available  
22 for free on the Web to a non-AOL subscriber,

1 as well as to a subscriber for dial-up access.

2 Q So again, the idea before was to  
3 do what again, when you talk about imputing --

4 A To attribute -- Should we look for  
5 a revenue share inclusion in this proceeding,  
6 that we might impute the revenue that would  
7 have been earned on the broadband product, had  
8 we had audio ads, based on the total listening  
9 hours in broadband, the ads that would have  
10 been served, and apply to those a rate based  
11 on what we earned in the products that did  
12 contain advertising.

13 Q Is a calculation like that  
14 necessary now for you?

15 A It isn't necessary now that we  
16 have added audio advertising to that product,  
17 because we obviously are running ads there.

18 Q Okay. You list some figures. I  
19 won't ask you to state them out loud, so we  
20 can stay on the public record. But in  
21 paragraph 3 you list some figures for your  
22 sales of in-stream advertising revenues.

1 retain their AOL e-mail address and continue  
2 to use our software and products and get to  
3 all of our content without paying a fee, if  
4 they have their own dial-up connection.

5 In doing so, AOL is forfeiting  
6 basically that piece of our subscription  
7 business, but working on building a broader  
8 advertising business.

9 The implications for radio are  
10 simply that we had a product that had a few  
11 differences in this broadband radio product,  
12 and those users are now no longer going to be  
13 paying us a subscription fee. So we have  
14 determined that we will make the broadband  
15 fidelity, sound fidelity, available to  
16 everyone who uses our radio product, whether  
17 they are a paying dial-up subscriber or a free  
18 user.

19 Q So if I can just break this down  
20 so we make sure we are clear. Prior to this  
21 recent change, users would have an broadband  
22 Internet access subscription, and then they

1 A Yes.

2 Q Are those accurate to the best of  
3 your knowledge?

4 A Yes.

5 Q Now are there any other planned  
6 changes or recent changes to the AOL broadband  
7 radio product?

8 A There have been some very major  
9 changes to AOL's overall business in the past  
10 few months that you may have read about in the  
11 press, and they do have implications for  
12 radio, although radio was not part of, nor was  
13 it discussed at any point in those strategic  
14 discussions.

15 So AOL has elected to no longer  
16 sell subscription products to users that have  
17 their own broadband connection. So the  
18 business that we were in of both selling dial-  
19 up access as well as a subscription product  
20 for people who had their own access through a  
21 cable company or through a DSL provider -- we  
22 are exiting that business, and users can now

1 would also have a subscription to these AOL  
2 products, including radio?

3 A Correct.

4 Q Okay. And now that part of the  
5 package with the AOL products is now being  
6 offered for free?

7 A Right.

8 Q Now does this have any  
9 implications for the revenue issues that we  
10 were just speaking about a few minutes ago?

11 A It doesn't, in that we had already  
12 added the in-stream advertising. So, really,  
13 the only change that this makes is that we are  
14 offering the broadband sound quality of  
15 fidelity which had previously been different  
16 between the broadband product and the narrow  
17 band or free product, which had streamed at  
18 a lower fidelity.

19 Q And will there be subscription  
20 revenues to have to allocate, as we were  
21 discussing before?

22 A No, because we won't be in that

1 business. the only subscriptions that people  
2 will be buying from AOL will be for dial-up  
3 access to the Internet.

4 Q Now if I could direct your  
5 attention to Paragraph 5(b) -- well, first at  
6 the beginning of Paragraph 5 you say that  
7 these changes have a number of other  
8 implications with respect to your testimony.

9 A Yes.

10 Q And in 5(b) you discuss again  
11 Professor Brynjolfsson's testimony, if you  
12 could just take a look at that. Could you  
13 just tell me -- or tell the court what your  
14 point there in 5(b) was that you were getting  
15 at? Take a moment.

16 A Sure. So my point there is that  
17 Professor Brynjolfsson argues that we are  
18 either intentionally or artificially deflating  
19 our revenue on the radio product. My position  
20 is that we have never been in a sold out  
21 situation. He would be accurate if we had  
22 been in a sold out situation with our audio

1 advertisements into the XM stations, we would  
2 simply be moving sold advertisements from one  
3 station to another and not actually making  
4 more money, because the demand isn't there to  
5 warrant having advertisements.

6 Q Okay. Let's move on to the next  
7 section, page 4. There is a section called  
8 Brynjolfsson's Use of AOL Holding Analysis.  
9 Can you just refresh our recollection on what  
10 this document was, the holding analysis?

11 A In February of 2005, I prepared  
12 what I've called holding analysis for Eric  
13 Ronning and Andy Lipset.

14 Q Who are they?

15 A They are the principals in the ad  
16 rep'ing firm that represents AOL and Yahoo!  
17 and, I believe, also MSN and Live365 for sales  
18 of audio advertisements, and they sell us as  
19 a network.

20 At that time, we were talking  
21 about whether advertisements should be added  
22 into the broadband product, and I looked at

1 advertisements, but we were not; and as we got  
2 closer to that, we continued to add inventory  
3 to keep pace with marketplace demand, and we  
4 did that by adding additional spots per hour,  
5 and we have done that now by adding the  
6 advertisements into the broadband radio  
7 product. So the assertion is just simply not  
8 true.

9 Q Now in Paragraph (c) you make  
10 another point or a similar point with respect  
11 to your XM radio stations.

12 A Yes. So as I believe you know, we  
13 have a partnership with XM where we offer XM  
14 radio stations on our products in addition to  
15 our own programmed radio stations. Again, if  
16 we were in a sold out situation, the fact that  
17 there are no advertisements in the XM stations  
18 might be leaving money on the table. However,  
19 we are on average about 70 percent sold out  
20 today, and in the last month that I saw in  
21 August of '06, 50 percent sold out.

22 So if we were to add

1 what the opportunity would be in a growing  
2 marketplace demand scenario. So it was a  
3 holding analysis assuming aggressive usage  
4 increases, 100 percent sell-through, and  
5 regular dollar CPM increases every year over  
6 the course of four years.

7 It was not intended ever to be a  
8 forecaster projection of what we would make.  
9 It was intended to be a look at what the  
10 potential might be of certain marketplace  
11 situations came to bear, and if we sold all of  
12 those advertisements.

13 The assumptions that I made there  
14 were wholly uninformed by any feedback from  
15 Eric and Andy. I sent that document to them  
16 without their having given me guidance. So  
17 the fact that I was assuming an increase of a  
18 dollar CPM every year was simply a simple  
19 assumption for somebody to react to, assuming  
20 that marketplace demand would go up.

21 Q Let's just talk about some of  
22 these details, and I would direct your



1 attention to Paragraph 8 of your statement.  
2 I just want to take these points one at a time  
3 that you just mentioned quickly.

4 In 8(a) you talk about the sell-  
5 out rates.

6 **A Yes.**

7 **Q** That was a part of this document.  
8 Can you just tell us again specifically what  
9 the assumption was in this document?

10 **A** The assumption was that we were  
11 100 percent sold out in the narrow band  
12 product and, therefore, that ads would even be  
13 sold at all in the broadband product, which  
14 has not come to fruition, and where we have  
15 come close, we have simply added inventory.

16 **Q** And Paragraph (b) talks about the  
17 CPM figures that were assumed for purposes of  
18 this calculation. Tell us --

19 **A** So this assumed that in 2006 we  
20 would be earning \$4.00 CPM versus the \$3.00 we  
21 were earning in 2005 and that it ramped up a  
22 dollar each year over the course of four

1 of historicals. We had just started surveying  
2 audio ads and working with Ronning Lipset, and  
3 we had not yet noted that, because of the way  
4 that our product works, you don't necessarily  
5 hear an ad the minute you log on the way you  
6 do in some of our competitors' products.

7 The assumption that somebody would  
8 actually hear, you know, three spots an hour  
9 or four spots an hour doesn't work out  
10 mathematically, the way our product works,  
11 because we don't introduce an ad at the  
12 beginning. We introduce it at the point in  
13 the broadcast wherever we are.

14 **Q** And that discounts --

15 **A** That discounts basically the total  
16 number of ad avails that are available to be  
17 sold.

18 **Q** Okay. Now in fact, you in your  
19 deposition explained some of these  
20 shortcomings when you were deposed. Correct?

21 **A** I did.

22 **Q** And do you recall when your

1 years. The \$4.00 assumption for 2006 has not  
2 come to fruition. I understand that we are  
3 still selling at around a \$3.00 CPM.

4 **Q** And then in (c) you mention  
5 assumptions about streaming hours that were  
6 included in the document.

7 **A** It assumed very aggressive usage.  
8 Based on our current models and actual usage  
9 through September of this year, our actual  
10 usage will probably come in -- This was done  
11 when I only had August numbers. I now have  
12 September numbers. It is probably going to  
13 come in around 60 percent of that forecast.

14 So the usage is much lower, and  
15 our current forecast for 2007, based on where  
16 we are today, is about half of what was in  
17 that document.

18 **Q** Okay. And then point (d) you  
19 mention that it assumes a certain -- or has a  
20 certain assumption about the number of ads  
21 served to listeners per hour.

22 **A** At that time we didn't have a lot

1 deposition was?

2 **A** It was the last week in February.

3 **Q** Moving quickly here, let's take a  
4 look at page 8, if we could. There is a  
5 section here with a headline "The Narrow  
6 Casting Argument." Can you just tell me what  
7 you understand the idea of narrow casting to  
8 be?

9 **A** Yes. That concept is that we  
10 provide very specific genre stations to fans  
11 of that specific music, and the argument is  
12 that this in some way impacts sales of that  
13 music, because it is available in a very  
14 targeted fashion on a very narrow station of  
15 genre interest.

16 **Q** And I take it, you put together  
17 Exhibit 4 in response to this argument.  
18 Correct?

19 **A** Yes. We provide every month with  
20 our payment to SoundExchange a report  
21 detailing total listening hours on the AOL  
22 product, and it also provides total listening

1 hours by station. So empirical data is  
2 available to show what listening looked like  
3 on some of these narrow casted stations.

4 Q Okay. Now let's just take a look  
5 at Exhibit 4. Can you just -- So we are all  
6 clear on what is being displayed here, can you  
7 just explain the document?

8 A This is a list of all of the  
9 stations available on AOL radio listed in  
10 order of total time spent listening in the  
11 month of March, and it lists out the genre of  
12 the stations, how many hours were listened,  
13 and the total percentage of listening  
14 happening on that station. That's the Percent  
15 of Total column.

16 Q Okay.

17 A And the cume percent simply adds  
18 up the number of stations that have been  
19 listed at that point in terms of total  
20 listening on an additive basis.

21 Q And this is from March 2006?

22 A Correct. Most months are

1 A No.

2 Q Where do those show up?

3 A They show up much further down the  
4 list. As you sort of scroll through these  
5 pages and bear down the list, you will see  
6 that a lot of the stations that I would  
7 interpret to be narrowcasted stations fall  
8 well to the bottom of this list, usually lower  
9 than a tenth of a percent of our total  
10 listening hours.

11 Q And on what basis -- When you  
12 describe these stations that are up toward the  
13 top, on what basis would you compare them to  
14 terrestrial radio stations?

15 A If you look at Exhibit 5, you see  
16 that we polled from online a look at what  
17 types of stations are available in major  
18 markets in terrestrial radio, and they are  
19 much the same types of stations.

20 Q Just so we are clear, there is a  
21 Notes column on this document where you --

22 A We basically took a break here to

1 substantively similar to this make-up, with  
2 the exception of, you know, for instance, if  
3 it is the holiday season and we put up some  
4 Christmas stations, those tend to obviously  
5 rise higher up in the rankings. But other  
6 than that, this is representative.

7 Q Okay. Just tell us what  
8 conclusion do you draw looking at, say, the  
9 top 26 ranked stations here where you have the  
10 line cutting across. What conclusion do you  
11 draw from looking at these rankings?

12 A So the majority of listening is  
13 happening in your broad genre stations, in  
14 exactly the type of stations that you find in  
15 terrestrial radio. You are looking at, you  
16 know, top 20 hits. You are looking at  
17 Seventies and Eighties music, top country,  
18 adult alternative, the types of stations that  
19 are airing in broadcast radio.

20 Q Now are these stations that you  
21 would characterize as narrow or niche  
22 stations?

1 indicate where 50 percent of listening, 60  
2 percent, 70 percent, 80 percent was happening,  
3 how many stations fell into that grouping. So  
4 80 percent of our listening is happening in  
5 the top 87 stations, but 50 percent of it is  
6 happening in just the top 28 stations, which  
7 are your broad genres. So the majority are  
8 really happening in a very small number of  
9 broad interest stations.

10 MR. LARSON: I have no more  
11 questions.

12 CHIEF JUDGE SLEDGE: Mr. Joseph,  
13 any questions?

14 MR. JOSEPH: No questions, Your  
15 Honor.

16 CHIEF JUDGE SLEDGE: Mr.  
17 Steintal?

18 MR. STEINTAL: Your Honor, one  
19 more housekeeping issue with respect to NPR,  
20 which I neglected to mention at the outset.

21 Ms. Brown has actually taken a  
22 leave from Weil Gotshal to become General

1 Counsel of a company here in Washington on a  
2 six-month basis, and so she is not going to be  
3 here representing NPR. There will be a  
4 combination. Mr. Taylor will ask some  
5 questions for NPR, and I or Mr. Sugarman of my  
6 office may as well from time to time,  
7 depending on scheduling.

8 So I just wanted to explain why  
9 Ms. Brown isn't here, because she is taking an  
10 opportunity. In this case, Mr. Taylor will be  
11 representing NPR.

12 CHIEF JUDGE SLEDGE: Thank you.  
13 Mr. Taylor, any questions?

14 MR. TAYLOR: Yes, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. TAYLOR:

17 Q Good morning, Ms. Winston. I am  
18 David Taylor representing National Public  
19 Radio.

20 I just want to explore one thing  
21 that you mentioned. You had said that the AOL  
22 service, when it begins, is different from

1 spider webs.

2 Mr. Handzo?

3 MR. HANDZO: Thank you, Your  
4 Honor.

5 BY MR. HANDZO:

6 Q Good morning, Ms. Winston.

7 A **Good morning.**

8 Q Just following up on Mr. Taylor's  
9 last question, I take you, you would regard  
10 broadcasters who simulcast their signal as  
11 competitors of AOL?

12 A **Yes, competitors listening to  
13 music programs.**

14 Q Now turning to page 2 of your  
15 written statement --

16 A **Yes.**

17 Q -- you have some figures there for  
18 in-stream advertising revenues and, like Mr.  
19 Larson, I won't ask you the actual number so  
20 we don't have to go into restricted session.  
21 But you indicate that 2006 in-stream  
22 advertising revenues at the time of the

1 some of your competitors' in that at the time  
2 that a listener logs on, they do not  
3 automatically hear a commercial as they would  
4 with one of your competitors. Do you remember  
5 that?

6 A **Yes.**

7 Q Do you view public radio as a  
8 competitor of your AOL radio service?

9 A **No, I do not.**

10 Q And are you familiar with the fact  
11 that public radio does not offer any  
12 commercials on its webcasting service?

13 A **Yes, I am.**

14 MR. TAYLOR: No further questions.

15 CHIEF JUDGE SLEDGE: Mr. Malone?

16 MR. MALONE: Your Honor, IBS and  
17 HRB have no questions.

18 CHIEF JUDGE SLEDGE: Mr.  
19 Freundlich?

20 MR. FREUNDLICH: No questions.

21 CHIEF JUDGE SLEDGE: I'm sorry.

22 It has been a while. Getting, what is it, the

1 change, the change being when you put ads into  
2 broadband, were approximately -- and you give  
3 a number.

4 My question is: Through what date  
5 were those revenues earned?

6 A **I believe, through September.**

7 Q Through September of 2006?

8 A **I believe so, yes.**

9 Q Let me just be clear. I am  
10 focusing on the first number, not the second.  
11 You have two numbers here.

12 A **Yes. I believe these were our  
13 forecasts and where we actually have come in.**

14 Q Let me go back. You say the in-  
15 stream advertising revenues at the time of the  
16 change were approximately, and you have a  
17 number.

18 A **Yes.**

19 Q And the change we are referring to  
20 here is putting ads into broadband. Right?

21 A **Our forecasts for the year at the  
22 time that we -- before we put the change in**

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1 place was the first number, and with the  
2 change in place based on what happened in a  
3 few of the subsequent months, we raised our  
4 forecasts to double that amount. Does that  
5 make sense?

6 Q Yes, but you confused me now in  
7 another way. Are you telling me that these  
8 numbers are your forecasts for the revenues  
9 for the year?

10 A For audio advertising, audio only,  
11 not banner.

12 Q For the year?

13 A Yes.

14 Q Okay. Because if you look at your  
15 statement, it represents that those figures  
16 are the revenues year to date. Do you see  
17 that?

18 A Yes, and I apologize for that.  
19 That is -- The second number is our forecast  
20 for the year, and that was based on -- I  
21 believe the reason that this is confusing is  
22 that was based on revenues we had earned year

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1 to date and the run rate of those revenues.

2 Q So adding advertising to broadband  
3 effectively doubled your in-stream advertising  
4 revenues. Correct?

5 A It increased the revenue that AOL  
6 was getting from Ronning Lipset. As I  
7 understand it, this represents a share shift  
8 of dollar to AOL from some of the other  
9 partners in the advertising venture.

10 The way that it works is that  
11 Ronning Lipset sells us an aggregate, and we  
12 receive a share of what they sell based on the  
13 total number of advertisements that we serve;  
14 and because we increased the number of  
15 advertisements that we serve, we took a larger  
16 share of what Ronning Lipset was able to sell.

17 As I understand it, this  
18 represents more of a share shift than a  
19 marketplace demand issue, and I would defer to  
20 Eric Ronning and his testimony as to what is  
21 happening in the marketplace.

22 Q The bottom line is adding ads into

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1 broadband has doubled your revenues. Correct?

2 A AOL made more money, but the total  
3 revenues being earned on Internet radio from  
4 this partnership don't necessarily go up. So  
5 in aggregate--

6 CHIEF JUDGE SLEDGE: You are not  
7 answering his question.

8 THE WITNESS: Okay.

9 CHIEF JUDGE SLEDGE: You have  
10 given an answer that he did not ask.

11 THE WITNESS: Okay. Please  
12 restate the question.

13 BY MR. HANDZO:

14 Q Sure. My question is very simply:  
15 Adding in-stream advertising to broadband has  
16 doubled the revenues for AOL?

17 A Yes. AOL is making more money.

18 Q Okay. Now AOL still does not put  
19 in-stream ads into certain of its radio  
20 channels. Correct?

21 A Correct, the channels provided by  
22 XM.

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1 Q And if it did, AOL would increase  
2 its revenues. Correct?

3 A If we were to put advertisements  
4 into the XM stations, it is unclear that XM  
5 would continue to want to provide us with  
6 those stations. I think it would change the  
7 nature of our arrangement with them.

8 Q Well, assuming you got XM's  
9 consent --

10 A Yes.

11 Q -- you would increase your  
12 revenues, if you put in-stream ads into those  
13 channels?

14 A Yes. We would get a larger share  
15 of what Ronning Lipset sells.

16 Q With in-stream advertising in the  
17 broadband channels now, your current sell-  
18 through rate is what?

19 A In August it was 51 percent.  
20 That's the last number I saw.

21 Q And that is running four ads per  
22 hour?

1 **A Correct.**

2 **Q** Now let me ask you to take a look  
3 at a document we previously -- has previously  
4 been admitted as SoundExchange Exhibit 26DR.

5 JUDGE WISNIEWSKI: Mr. Handzo, I  
6 congratulate you for Xeroxing on paper that is  
7 recycled.

8 MR. HANDZO: We are very  
9 environmentally conscious, Your Honor.

10 BY MR. HANDZO:

11 **Q** Ms. Winston, that is, in fact, the  
12 holding analysis that you were referring to  
13 before. Correct?

14 **A Correct. Yes, it is.**

15 MR. LARSON: If I could just  
16 interrupt. Just so we are clear, I believe it  
17 was marked before as Exhibit 167 during the  
18 direct phase of the testimony.

19 MR. HANDZO: Well, I can only tell  
20 you what exhibit sticker is on there now. It  
21 was submitted, I know, with Dr. Brynjolfsson's  
22 amended testimony in the opening phase of the

1 **A That is correct, although I would**  
2 **say that again it was not a projection for**  
3 **what I felt would actually occur.**

4 **Q** All right. Whatever you want to  
5 call it, you put down 50 percent as the sell-  
6 through rate selling three ads per hour.

7 **A That is correct. Yes.**

8 **Q** And in fact, you have hit 50  
9 percent selling four ads per hour.

10 **A Correct.**

11 **Q** You mentioned in your testimony,  
12 Ms. Winston, that AOL is going to get out of  
13 the business of selling broadband access. Is  
14 that right?

15 **A Correct.**

16 **Q** But it is still in that business  
17 as of today, is it not?

18 **A Yes.**

19 **Q** Do you know exactly when AOL is  
20 going to get out of that business?

21 **A I do not know exactly when we will**  
22 **get out of that business, in that it will**

1 case, and I think it had the exhibit number  
2 that I recited. It might have also been used  
3 in another time in the trial.

4 BY MR. HANDZO:

5 **Q** In any event, that is the holding  
6 analysis that you are talking about?

7 **A Correct.**

8 **Q** If you look at the third page, at  
9 the bottom you see that you have some  
10 estimates or projections or whatever you want  
11 to call them about what the sell-through rate  
12 is going to be if you open up broadband to  
13 advertising. Correct? Yes?

14 **A Yes. Sorry .**

15 **Q** And in fact, if you look at the  
16 number for 2006, it is actually about where  
17 you, in fact, have wound up. Right?

18 **A Yes. It indicates that for the**  
19 **year it would be 50 percent.**

20 **Q** And when you made that projection,  
21 you were assuming only three ads per hour.  
22 Correct?

1 **depend on how quickly users migrate from the**  
2 **paid off rank to the free offering.**

3 **Q** For the time being, as long as AOL  
4 is still offering broadband access, it is  
5 still using the premium radio service as one  
6 of the incentives to get people to subscribe  
7 to that service. Is that not right?

8 **A We are not using it as an**  
9 **incentive, as we have ceased all marketing for**  
10 **the broadband subscription service. AOL is**  
11 **not spending marketing dollars looking for**  
12 **broadband subscribers.**

13 **Q** Ms. Winston, I am going to show  
14 you what I have marked as SoundExchange Trial  
15 Exhibit 136, and I can't represent for sure  
16 that this was done in recycled paper. In  
17 fact, it was not.

18 JUDGE WISNIEWSKI: You are right.  
19 (WHEREUPON, THE DOCUMENT  
20 REFERRED TO WAS MARKED  
21 AS SX TRIAL EXHIBIT NO.  
22 136 FOR IDENTIFICATION.)

1 BY MR. HANDZO:

2 Q Ms. Winston, do you recognize this  
3 as a AOL web page?

4 A Yes.

5 Q And this is a current AOL web  
6 page. Correct?

7 A **I can't say for sure, but if you  
8 tell me you printed it recently, I am willing  
9 to --**

10 Q I will tell you we printed it  
11 yesterday.

12 A Okay.

13 Q And you see there where it says,  
14 if you do keep AOL as your connection to the  
15 Internet, you get all the benefits of free AOL  
16 plus additional benefits not available to free  
17 users. You see that? Yes?

18 A Yes, I do. Sorry.

19 Q And one of those benefits not  
20 available to free users is more choices on AOL  
21 radio. Correct?

22 A Yes.

1 **plan for an a la carte radio product.**

2 Q So the subscription is \$24 and up?

3 A **No, \$24 and down.**

4 Q I asked you a few questions before  
5 about the XM channels that AOL offers. Am I  
6 correct that there are 20 channels programmed  
7 by XM that are currently available to anyone  
8 who wants to listen to AOL radio?

9 A Yes.

10 Q And there are an additional 50  
11 that are -- 50 XM channels that are available  
12 to subscribers?

13 A **Only to the current broadband  
14 subscribers. There are 20 available to the  
15 narrow band subscribers, just as there are to  
16 anyone listening to it free on the Web.**

17 Q Okay. And then 50 available to  
18 the broadband subscribers?

19 A **Fifty additional to the broadband  
20 subscribers.**

21 Q And none of those channels carry  
22 in-stream audio advertising. Right?

1 Q All right. So this is what AOL is  
2 telling people who are either current  
3 subscribers to its broadband service or  
4 potential subscribers. Correct?

5 A **That appears to be the case, yes.**

6 Q And what AOL is telling those  
7 people is that the reason they opt to  
8 subscribe or keep their subscription is that  
9 they get the premium radio product.

10 A **Well, it is one of the things  
11 listed here, yes.**

12 Q And AOL currently charges what for  
13 that subscription service?

14 A **There are different price plans.  
15 So it could vary. There is a dial-up price  
16 plan that is approximately \$24, and then there  
17 are some other high speed add-ons that someone  
18 can purchase to get additional services, if  
19 they do have a broadband connection and want  
20 things like virus protection, etcetera; and  
21 those are priced at the current price points  
22 for those things. But there is no price point**

1 A **Correct.**

2 Q Now in your statement on page 4,  
3 just above the section that addresses Dr.  
4 Brynjolfsson's holding analysis, you state  
5 that AOL includes the XM channels not to  
6 attract listeners but as a cost shifting  
7 mechanism. Do you see that?

8 A **Correct. Yes.**

9 Q You are not saying surely that AOL  
10 derives no monetary benefit from those XM  
11 channels?

12 A **We do, in that XM covers the cost  
13 of listening. So if XM programs an Eighties  
14 station for us, we don't pay royalties on an  
15 Eighties station of our own.**

16 Q AOL derives monetary benefits by  
17 offering those channels to its listeners, does  
18 it not?

19 A **We have cost savings, yes.**

20 Q And it derives additional revenue  
21 by virtue of offering those channels, doesn't  
22 it?

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1 A No.

2 Q Well, let me ask you this. AOL  
3 pays the bandwidth costs for those XM  
4 channels, does it not?

5 A Yes, we do.

6 Q So if this was just a cost saving  
7 mechanism, you would save a lot more money by  
8 just not offering the channels at all. Right?

9 A No. If we didn't offer the XM  
10 stations, we would need to bring back our own  
11 stations covering major genres like Eighties  
12 music, and then we would be paying the  
13 royalties on those stations again, as we did  
14 in the past.

15 So in some ways, there has been a  
16 replacement here. We have actually sunsetted  
17 some of the stations that we used to offer and  
18 replaced them with XM stations. So we really  
19 have just switched out the bandwidth costs  
20 that we were paying for our own station for  
21 bandwidth for an XM station.

22 Q And the reason you would need to

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1 they circulate around.

2 A Yes.

3 Q And the more people you can bring  
4 in, the more money you are going to make.

5 A Correct.

6 Q And having those XM channels helps  
7 bring in those people, doesn't it?

8 A Having a variety of channels does,  
9 yes.

10 Q Okay. Now in addition to whatever  
11 AOL might make by bringing in people to  
12 listen to those XM channels, AOL also gets  
13 some commerce opportunities through those XM  
14 channels, doesn't it?

15 A Do you mean do we sell things off  
16 of the radio product? I'm not sure I  
17 understand the question.

18 Q Well, let me do this. Ms.  
19 Winston, I am going to show you what I have  
20 marked as SoundExchange Exhibit 137.

21 A Thank you.

22 (WHEREUPON, THE DOCUMENT

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1 bring back those AOL stations is that you  
2 would lose listeners if you didn't have those  
3 stations. Right?

4 A Sure. Variety is the selling  
5 point.

6 Q Okay. And you make money by  
7 bringing listeners to the AOL portal. Right?

8 A We make money by having listeners  
9 who listen to audio ads and see banner ads,  
10 yes.

11 Q And you also make money by  
12 bringing listeners into the portal and having  
13 them go to other places and see other content  
14 and look at other ads. Right?

15 A Yes, and we make money because  
16 they come into other parts of the network and  
17 come to radio then and discover it, and see  
18 ads there.

19 Q That's the point of a portal.  
20 Right?

21 A Exactly.

22 Q Bring people into the portal, and

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1 REFERRED TO WAS MARKED  
2 AS SOUNDEXCHANGE EXHIBIT  
3 NO. 137 FOR  
4 IDENTIFICATION.)

5 Q Ms. Winston, this is a screen shot  
6 of the AOL media player, is it not?

7 A It is the radio player, yes.

8 Q The radio player. And it is a  
9 shot of the radio player playing an XM  
10 channel. Correct?

11 A Correct.

12 Q In this case, XM 80?

13 A Yes.

14 Q All right. Down near the bottom  
15 of the player, do you see something that says  
16 "Sign up for XM"?

17 A Yes.

18 Q And if the listener clicks on  
19 that, they will be taken to a page that allows  
20 them to sign up for XM satellite radio.

21 Correct?

22 A Correct.

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1 Q And if they do that, AOL earns a  
2 bounty, does it not?

3 A I am not aware that we do, and  
4 this may go to my familiarity with the  
5 particulars of the XM deal, but I am not aware  
6 that we earn a bounty.

7 Q You just don't know, one way or  
8 the other?

9 A No, I don't. I apologize.

10 Q You also see something that says  
11 "Music downloads" there. Do you see that?  
12 And if the listener clicks on that, they will  
13 go to AOL's On Demand music service. Correct?

14 A I believe so, yes.

15 Q And that is a subscription  
16 service?

17 A It is a subscription service.  
18 Correct.

19 Q AOL makes 9.95 a month from those  
20 who subscribe?

21 A Yes. We make money, and we pay  
22 royalties to the labels for that money that we

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1 make.

2 Q There is also a line here that  
3 says "Buy tickets." Do you see that?

4 A Correct.

5 Q And if somebody clicks on that,  
6 that takes you to AOL's ticket service.  
7 Correct?

8 A Correct.

9 Q And if you buy tickets through  
10 that, AOL makes money that way, too.

11 A Correct.

12 Q So there are commerce  
13 opportunities related to these XM channels.  
14 Right?

15 A There are, and in every instance  
16 where AOL offers the commerce directly, we are  
17 paying appropriate royalties and have separate  
18 licenses to pay out revenue share on that  
19 money to the parties that own the content.

20 Q One would hope, but you are also  
21 making money on that. Right?

22 A Correct.

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1 MR. HANDZO: Your Honor, I would  
2 offer Exhibit 137 into evidence.

3 CHIEF JUDGE SLEDGE: Any objection  
4 to SoundExchange Exhibit 137?

5 MR. LARSON: No objection, Your  
6 Honor.

7 CHIEF JUDGE SLEDGE: Without  
8 objection, it is admitted.

9 (WHEREUPON, THE DOCUMENT  
10 REFERRED TO, PREVIOUSLY  
11 MARKED AS SOUNDEXCHANGE  
12 EXHIBIT NO. 137 FOR  
13 IDENTIFICATION, WAS  
14 ADMITTED INTO EVIDENCE.)

15 BY MR. HANDZO:

16 Q Ms. Winston, you mentioned that  
17 AOL is essentially changing its business model  
18 to become a portal where its content is  
19 offered for free. Do you recall that?

20 A We had already changed our  
21 business model last June to become a portal  
22 where content was offered for free. The

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1 current change that was announced at the  
2 beginning of August is that we are no longer  
3 to be in a broadband subscription business.

4 Q And in connection with those  
5 changes, AOL has been out in the marketplace  
6 attempting to essentially sell itself to  
7 consumers -- Correct? -- and explain these  
8 changes?

9 A Correct.

10 Q All right. Let me show you a  
11 document that we have marked as SoundExchange  
12 Trial Exhibit 138. Let me ask you first, are  
13 you familiar with this document?

14 A I have not seen this document  
15 before.

16 Q Have you seen documents like this  
17 one?

18 A I have seen various PowerPoint  
19 presentations, yes, but I don't -- I haven't  
20 seen this document. I am happy to try to  
21 answer, but I haven't seen this before.

22 (WHEREUPON, THE DOCUMENT



**REFERRED TO WAS MARKED  
AS SOUNDEXCHANGE EXHIBIT  
NO. 138 FOR  
IDENTIFICATION.)**

Q Well, let me ask you to turn to  
page 6 of this document, please.

A Okay.

Q You see there is a section where  
it says "Overarching Message."

A Yes.

Q And that is intended to be the  
overarching message that AOL gives to  
customers and potential customers. Right?

MR. LARSON: Your Honor, I would  
object to the question. Lack of foundation  
that the witness has any knowledge of what  
this document is, and can answer to what it is  
intended to be communicated.

CHIEF JUDGE SLEDGE: Overruled.  
If she has that information, she can answer  
it.

THE WITNESS: Can you repeat the

another e-mail provider and taking along with  
it all of their content usage and advertising  
dollars, which had been the dynamic going on  
in the marketplace for us.

Q Now if you turn to page 12, one of  
the proof points that is being suggested here  
in terms of the message to consumers relates  
to AOL radio. Correct?

A Yes. It appears to.

Q So in terms of the guidance that  
AOL is providing in terms of how to market the  
new AOL, radio is part of that marketing  
message. Correct?

A Yes, although I am confused as to  
how these two things relate to one another in  
that the first page you are referring to  
relates to somebody getting our access for  
free and not paying us a subscription. So  
this proof point would be about a free  
service.

Q All of the services are going to  
be free. Right?

question, please?

BY MR. HANDZO:

Q Sure. This page, basically,  
contains the overarching message that AOL is  
trying to communicate to consumers. Correct?

A Yes.

Q Okay. And it indicates that,  
along with this overarching message, the  
communication to consumers would include what  
this refers to as relevant proof points. Do  
you see that?

A I see that, yes.

Q And those proof points would be  
specific aspects of the AOL service that are  
being touted to consumers. Correct?

A Yes. I mean, the basic message we  
want to get out to consumers is that you no  
longer have to -- If you have your own  
connection to the Internet, you no longer have  
to pay AOL to keep your AOL e-mail address and  
to get to everything that you use today from  
AOL. So that people are not switching to

A Yes.

Q Okay.

A So this could be a proof point for  
why somebody would use our free services.

Q Right.

A Okay.

Q And in fact, it is a proof point  
as to why somebody would use your free  
services. Right?

A It is one of the things that we  
offer that consumers like and use.

MR. HANDZO: May I just have a  
moment, Your Honor.

CHIEF JUDGE SLEDGE: Sure.

BY MR. HANDZO:

Q Just one more thing, Ms. Winston.  
Let me show you what I have marked as  
SoundExchange Trial Exhibit 139 and ask you to  
take a look at that.

The first question is whether you  
have seen this document before.

A I had at the time that the deal

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1 was being negotiated. Yes.  
 2 (WHEREUPON, THE DOCUMENT  
 3 REFERRED TO WAS MARKED  
 4 AS SOUNDEXCHANGE EXHIBIT  
 5 NO. 139 FOR  
 6 IDENTIFICATION.)

7 Q And if you flip to -- I believe it  
 8 is the second page -- two bullet points up  
 9 from the bottom of the page where it says --  
 10 two points above where it says "exclusivity  
 11 noncompete" --

12 A Yes.

13 Q Two bullet points up there is a  
 14 bullet point about XM paying bounties to AOL.  
 15 Do you see that?

16 A Correct.

17 Q A \$15 commission for every  
 18 satellite service activation. Do you see  
 19 that?

20 A Yes.

21 Q Is that accurate, to your  
 22 knowledge?

1 competitively sensitive.

2 CHIEF JUDGE SLEDGE: Any objection  
 3 to the motion to apply the protective order to  
 4 this exhibit?

5 MR. HANDZO: No, Your Honor.

6 MR. LARSON: Thank you, Your  
 7 Honor.

8 CHIEF JUDGE SLEDGE: Well, I  
 9 haven't ruled yet. What is the date of this  
 10 exhibit?

11 MR. LARSON: It appears to be  
 12 undated, Your Honor. I believe the XM  
 13 agreement was struck within the last year.

14 THE WITNESS: It is a 2005  
 15 document. That much I can tell you, probably  
 16 around mid-year.

17 CHIEF JUDGE SLEDGE: And, Mr.  
 18 Larson, what parts of it do you consider  
 19 confidential?

20 MR. LARSON: Well, certainly any  
 21 parts of it that describe financial terms  
 22 between the parties. I would have to look at

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1 A It would appear to be from this  
 2 document, yes.

3 MR. HANDZO: Your Honor, I would  
 4 move the admission of SoundExchange Trial  
 5 Exhibit 139.

6 CHIEF JUDGE SLEDGE: Any objection  
 7 to Exhibit 139?

8 MR. LARSON: No, Your Honor.

9 CHIEF JUDGE SLEDGE: Without  
 10 objection, 139 is admitted.

11 (WHEREUPON, THE DOCUMENT  
 12 REFERRED TO, PREVIOUSLY  
 13 MARKED AS SOUNDEXCHANGE  
 14 EXHIBIT NO. 139 FOR  
 15 IDENTIFICATION, WAS  
 16 RECEIVED INTO EVIDENCE.)

17 MR. LARSON: Your Honor, I would  
 18 move to have this exhibit entered under the  
 19 terms of the protective order. It is clearly  
 20 an internal document describing in some detail  
 21 the contents of the contract between XM and  
 22 AOL, which is not publicly known and clearly

1 it in some detail to identify specific ones,  
 2 but it appears to me to be a summary of  
 3 agreement points. Under the product section,  
 4 it explains what AOL -- or what XM is  
 5 providing. Under the marketing commitments,  
 6 it describes what AOL agrees to undertake and  
 7 what XM agrees to undertake in terms of its  
 8 marketing. The whole document, really,  
 9 encapsulates, at least at the stage it was  
 10 written, what was intended to be in the deal.

11 We could try to redact it, if  
 12 necessary, in some way, but it is a currently  
 13 operating agreement out there that is not  
 14 publicly known, and this --

15 CHIEF JUDGE SLEDGE: Not publicly  
 16 known is not a concept that is relevant, as I  
 17 understand it. Maybe you will educate me more  
 18 as we get our briefs next week on the  
 19 protective order, but as I understand it, that  
 20 is not a term that means anything.

21 MR. LARSON: Well, I mean, under  
 22 the terms of the protective order that is in

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1 place in this proceeding, clearly, I think the  
2 fact that the agreement is not publicly known  
3 indicates that it is competitively sensitive  
4 and not something the parties would want  
5 shared with Yahoo!, for example, or other  
6 people that could see it.

7 So I do think it is relevant that  
8 it is something that they would keep secret  
9 or, you know, within the company. That was,  
10 as I understood it, the point of entering into  
11 our protective order between the parties, to  
12 be able to shelter competitively sensitive  
13 documents like this.

14 CHIEF JUDGE SLEDGE: We will take  
15 this under advisement and let you know after  
16 the break.

17 MR. LARSON: Thank you, Your  
18 Honor.

19 CHIEF JUDGE SLEDGE: Mr. Handzo,  
20 that completes your questioning?

21 MR. HANDZO: Yes, it does, Your  
22 Honor. thank you.

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1 CHIEF JUDGE SLEDGE: Any questions  
2 from the bench? Thank you, Ms. Winston, you  
3 are excused.

4 All right. We will now take a  
5 recess until eleven o'clock, and -- do we need  
6 that long? That is 20 minutes.

7 MR. STEINTHAL: Your Honor, Mr.  
8 Lam flew in late last night from California.  
9 We called him, as things were progressing  
10 rather smoothly this morning, and woke him up.  
11 So he is going to get here as soon as he can.  
12 The direct for Mr. Lam will be no longer than  
13 half an hour, and probably less than that.

14 So the likelihood is that, if the  
15 cross-examination is commensurate with the  
16 direct examination, we will be done by lunch  
17 today.

18 We have lined up the witnesses  
19 based on their availability and have two  
20 witnesses scheduled for tomorrow, Mr. Fancher  
21 in the morning and Mr. Nebel in the afternoon,  
22 and have no expectation that we would run long

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1 CHIEF JUDGE SLEDGE: Mr. Larson,  
2 any further questions?

3 MR. LARSON: Your Honor, I wonder  
4 if we could just have -- Maybe it would be a  
5 good time to take our break, and then we could  
6 discuss whether we have questions or, if not,  
7 if I could just have a couple of minutes.

8 CHIEF JUDGE SLEDGE: We'll take a  
9 few minutes. We won't break for another 25  
10 minutes. That clock is an hour ahead.

11 MR. LARSON: Your Honor, we have  
12 no redirect.

13 CHIEF JUDGE SLEDGE: Mr. Joseph?

14 MR. JOSEPH: Nothing, Your Honor.

15 CHIEF JUDGE SLEDGE: Mr. Taylor?

16 MR. TAYLOR: Nothing, Your Honor.

17 CHIEF JUDGE SLEDGE: Mr. Malone?

18 MR. MALONE: We have no further  
19 questions, Your Honor.

20 CHIEF JUDGE SLEDGE: Mr. Oxenford?

21 MR. OXFORD: No questions, Your  
22 Honor.

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1 tomorrow.

2 So we just may finish early today.  
3 We can't get Mr. Nebel here or Mr. Fancher  
4 here this afternoon, but it will not set us  
5 back, based on the schedule we have in which  
6 the one curve ball is the Wednesday, because  
7 we had two witnesses scheduled, and what we  
8 will try to do is Mr. Isquith was going to be  
9 testifying on Wednesday, and then on Thursday  
10 we had Mr. Roback and Mr. Frank, both from  
11 Yahoo!

12 We will try to see what we can do  
13 with Mr. Isquith. We don't believe we can get  
14 him here tomorrow, which would be ideal; and  
15 if he doesn't go on Wednesday, we will try to  
16 slot him in first thing Monday, in light of  
17 everything else. But we will do our best to  
18 get everybody lined up so we can get all the  
19 webcaster witnesses done this week, with that  
20 one footnote as to Mr. Isquith.

21 CHIEF JUDGE SLEDGE: Well, what is  
22 your projection on when we should start back?

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1 MR. STEINTHAL: Maybe ten after  
2 eleven. We will give him another call right  
3 now. It's only 15 minutes from the hotel to  
4 here. So, hopefully, he will be able to get  
5 here by eleven, 11:15 latest, and we will  
6 still finish by lunch.

7 CHIEF JUDGE SLEDGE: Mr. Joseph?

8 MR. JOSEPH: Nothing. I was just  
9 standing for going into recess.

10 CHIEF JUDGE SLEDGE: All right.  
11 We will recess until eleven o'clock.

12 (Whereupon, the foregoing matter  
13 went off the record at 10:40 a.m. and went  
14 back on the record at 11:15 a.m.)

15 CHIEF JUDGE SLEDGE: We will come  
16 to order.

17 MR. STEINTHAL: Your Honor, the  
18 webcasters call Mr. Lam. Good morning, Mr.  
19 Lam.

20 MR. LAM: Morning.

21 CHIEF JUDGE SLEDGE: Just a  
22 moment, Mr. Steinthal. Apparently, I've got

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1 Q Can you remind the panel briefly  
2 what your title is at Live365 and what Live365  
3 does?

4 A Yes. I am the CEO of Live365, and  
5 Live365 offers Internet radio service for the  
6 Web and has been streaming since July 1999.

7 Q Now there is a phrase that has  
8 been used, "aggregator station." Is Live365  
9 an aggregator of Internet radio stations?

10 A Yes. We have roughly 10,000  
11 stations on our network.

12 Q And do some of them include  
13 individual broadcasters or hobbyists that  
14 create their own stations for purposes of  
15 broadcasting?

16 A Yes, thousands and thousands of  
17 them.

18 Q Now let me direct you to Paragraph  
19 3 of your written rebuttal testimony. In that  
20 paragraph and then in the next paragraph you  
21 state that Professor Brynjolfsson in his  
22 amended testimony misstated and

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1 a blank screen, and I don't know why. Looks  
2 like I somehow got cut off, it looks like.

3 Before we begin with Mr. Lam, we  
4 have pending the motion to apply the  
5 protective order on Exhibit 139. That motion  
6 is granted.

7 Mr. Lam, if you will please stand,  
8 I need to swear you in.

9 WHEREUPON,

10 N. MARK LAM  
11 was called as a witness by counsel for the  
12 Webcasters and, having first been duly sworn,  
13 assumed the witness stand, was examined and  
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. STEINTHAL:

17 Q Good morning, Mr. Lam.

18 A Good morning.

19 Q Do you recall generally having  
20 testified in the first phase of these  
21 proceedings?

22 A Yes, I do.

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1 mischaracterized Live365's business model by  
2 attributing irrelevant revenues to DMCA  
3 compliant webcasting.

4 Can you explain to the panel what  
5 you mean by irrelevant revenues?

6 A Okay. There are three -- In our  
7 view, there are three separate streams of  
8 income. One of them is subscription  
9 listening. We call it VIP listening. The  
10 other one is the ad supported revenue,  
11 actually, and the third one is what we charge  
12 broadcasters to actually help defray the cost  
13 of providing the platform to broadcast.

14 Actually, for the business scale  
15 and for to sustain itself, we actually have to  
16 either get it from the listeners who pay or  
17 our service has ad supported. The broadcast  
18 service in which we provide and which we are  
19 charging the customers right now is not  
20 scalable and is only an interim measure for us  
21 to basically defray our costs. Otherwise, we  
22 have no way of sustaining our service.

1       **As I testified last time, we have**  
 2 **gone through roughly \$60 million already since**  
 3 **the founding of the company about nine years**  
 4 **ago, and so we had to find an interim model to**  
 5 **make sure that we could, hopefully, live on to**  
 6 **see another day.**

7       Q   Let me parse through the three  
 8 categories of income that you talked about.  
 9 The subscription revenues are when subscribers  
 10 receive ad-free stations from Live365 in  
 11 return for paying a subscription fee per month  
 12 to Live365?

13       A   **Correct.**

14       Q   And that is relevant revenue.  
 15 That is not irrelevant revenue. Right?

16       A   **That is relevant revenue.**  
 17 **Correct. It is about 30 -- a little bit over**  
 18 **30 percent.**

19       Q   And then there is the advertising  
 20 that you sell in connection with the offering  
 21 of the actual channels. Correct?

22       A   **Correct.**

1       Q   And that is relevant revenue?

2       A   **That is relevant. Correct.**

3       Q   Now the third category of revenue  
 4 that you talked about in connection with  
 5 defraying costs -- is that revenue  
 6 attributable to the actual transmission of  
 7 sound recordings on any of your stations?

8       A   **No, definitely not. As I**  
 9 **mentioned earlier, the reason why we were**  
 10 **forced to charge that is because otherwise we**  
 11 **would not be even in existence today.**

12       Q   But beyond that issue, would the  
 13 individual hobbyists -- If they didn't pay you  
 14 for the provision of the broadcast services  
 15 that you provide that you testified about,  
 16 would they themselves have to incur those  
 17 costs?

18       A   **Yes.**

19       Q   So in essence, you are selling or  
 20 renting services to them --

21       A   **Correct.**

22       Q   -- for purposes of their

1 facilitating their ability to broadcast?

2       A   **Correct.**

3       Q   And roughly how much of the total  
 4 income, of the three buckets as a whole, is  
 5 represented by this, basically selling of  
 6 services to these other broadcasters?

7       A   **Those are 50 percent -- in fact,**  
 8 **45 percent, to be exact.**

9       Q   Okay. Now in Paragraph 4 of your  
 10 written statement, you refer to Professor  
 11 Brynjolfsson having made reference to a very  
 12 high annual compound growth rate for Live365,  
 13 and criticize him for doing that.

14       What did you mean by that?

15       A   **As you know, Live365 in the**  
 16 **beginning practically had no revenue. So for**  
 17 **example, Fiscal year 2002 was the year that it**  
 18 **actually started to see some revenue of**  
 19 **roughly \$1 million, and then Fiscal year 2003,**  
 20 **which -- Fiscal year 2003, we had revenue of -**  
 21 **- Excuse me.**

22       CHIEF JUDGE SLEDGE: Proceed. I

1 don't have any optimism that that will get any  
 2 better.

3       THE WITNESS: Okay. Then I speak  
 4 loud. In Fiscal Year 2003, we had revenue of  
 5 about \$2.3 million, and then in Fiscal 2004 we  
 6 have about 4.5. In Fiscal Year 2005 we had  
 7 about 6.4.

8       So taking the small basis, of  
 9 course, the percentage looks huge where we  
 10 have no revenue, let's say, in Fiscal Year  
 11 2001, going to 2002, and then from 2002 to  
 12 2003. They could be construed as on a  
 13 compounded basis rather dramatic, but when you  
 14 have a basis that small, I mean, you could  
 15 have a 5,000 percentage revenue. It doesn't  
 16 really matter, because the reality is, in  
 17 order for us to keep streaming, it costs  
 18 millions and millions of dollars a year.

19       BY MR. STEINTHAL:

20       Q   Let me first, for purposes of just  
 21 the transcript -- I asked you about the  
 22 compounding, and you gave an answer that

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1 included the revenue figures that you just  
2 talked about.

3 Are those revenue figures public  
4 information or are those revenue figures that  
5 you consider to be confidential and should be  
6 subject to some sort of protective order?

7 **A They should be subject to**  
8 **protective order. We are a private company.**

9 MR. STEINTHAL: Your Honor, I  
10 would move that the testimony specific to the  
11 annual revenues of Live365 be treated as  
12 restricted under the protective order.

13 CHIEF JUDGE SLEDGE: And where is  
14 that?

15 MR. STEINTHAL: Well, it has just  
16 been given in answer to the question about the  
17 compound growth issue.

18 CHIEF JUDGE SLEDGE: Where is  
19 that?

20 MR. STEINTHAL: It was my last  
21 question.

22 CHIEF JUDGE SLEDGE: Where is it

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1 in his written testimony?

2 MR. STEINTHAL: Well, he talks  
3 about the compound growth issue in Paragraph  
4 4, Your Honor. It is the sentence that starts  
5 "Second." He uses data from the years, and  
6 goes on.

7 CHIEF JUDGE SLEDGE: All right.  
8 In the middle of page 3 of the written  
9 testimony. Any objection to the figures  
10 stated therein in the paragraph dated "Second"  
11 as being subject to the restrictive order?

12 MR. SMITH: No, Your Honor.

13 CHIEF JUDGE SLEDGE: Without  
14 objection, those figures are -- The  
15 protective order applies.

16 MR. STEINTHAL: And my motion,  
17 Your Honor, also pertained to the actual  
18 answer given today, which gave specific annual  
19 numbers.

20 CHIEF JUDGE SLEDGE: Beyond what  
21 is in his written testimony?

22 MR. STEINTHAL: Yes.

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1 CHIEF JUDGE SLEDGE: What are  
2 those figures?

3 MR. STEINTHAL: I think he just  
4 testified as to annual figures for Fiscal  
5 Years 2003, 2004 and 2005, and what the annual  
6 increment was. I think it is just the prior  
7 two questions and answers.

8 CHIEF JUDGE SLEDGE: Looking at  
9 the middle of page 3, I am not clear on what  
10 those answers are, any different from that.  
11 Please re-ask that question.

12 MR. STEINTHAL: Well, Your Honor,  
13 it was in the context of asking the -- getting  
14 the answer to the question. He gave specific  
15 figures that refer specifically to the annual  
16 growth figure stated in Paragraph 4. So it is  
17 simply the actual annual revenue statistics  
18 that the witness cited that I am making the  
19 motion to keep under the protective order.

20 CHIEF JUDGE SLEDGE: Sounds like  
21 the way you are describing it that he has  
22 given information that is not answering a

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1 question you asked. If you will ask him the  
2 question, we will determine if that should  
3 apply the protective order.

4 BY MR. STEINTHAL:

5 Q Is the annual revenue information  
6 that you gave in response to my last question  
7 confidential information that is not public to  
8 Live365?

9 CHIEF JUDGE SLEDGE: You are not  
10 responding to my direction, Mr. Steinthal.  
11 From the way you characterized his testimony,  
12 it sounds like he was giving information for  
13 a question that had not been asked. So if you  
14 will ask him the question, then we will  
15 consider the answer as to whether the  
16 protective order applies.

17 (Whereupon, the foregoing matter  
18 went off the record at 11:29 a.m. for Closed  
19 Session, and went back on the record at 11:30  
20 a.m.)  
21  
22

1 CHIEF JUDGE SLEDGE: All right.  
2 Any objection to applying the protective order  
3 to the testimony for the revenue for 2002,  
4 2003, 2004, and 2005?

5 MR. SMITH: No, Your Honor.

6 CHIEF JUDGE SLEDGE: Without  
7 objection, that motion is granted.

8 BY MR. STEINTHAL:

9 Q And did the figures you just gave,  
10 without restating them on the record, include  
11 the revenues associated with the selling of  
12 services to broadcasters to facilitate their  
13 ability to put music on the Web?

14 A Correct.

15 Q Okay. In paragraph 5 of your  
16 written rebuttal testimony, you talk about  
17 Live365 having sold advertising revenue  
18 through the RLR network, Ronning Lipset, and  
19 Value Click. and you make a statement that the  
20 cost of selling ads through third party rep  
21 firms is painful, to use your words.

22 Can you explain what you meant by

1 sell internally, what do you mean by that?

2 A We have hired a Director of  
3 Advertisement who have years of experience and  
4 then for many, many months we just cannot get  
5 the accounts to -- you know, to have  
6 substantial order of advertising.

7 In fact, since the founding of the  
8 company -- The company was founded on the  
9 premises that ads would pay for listening, and  
10 we had tried year after year -- you know, we  
11 have hired different staff. We tried  
12 different methods and all that, but to no  
13 avail. I mean, we have found that we could  
14 rarely sell beyond a million dollars in  
15 revenue.

16 Q Are you familiar with the fact  
17 that Professor Brynjolfsson has asserted that  
18 webcasters have made a conscious choice not to  
19 maximize cash flow by not running ads as much  
20 as they could?

21 A That is totally inaccurate. If we  
22 could sell ads, there is no reason why we

1 painful?

2 A Yes. We used two outside --  
3 primarily two outside networks to sell our  
4 ads, in addition to charges that were  
5 internally, and we -- In the case of Value  
6 Click, we had to give up half the gross  
7 revenue to Value Click for the graphics ads,  
8 and in terms of RLR we had to give them about  
9 40 percent. We give that 40 percent in order  
10 to even get sold by RLR within the bigger  
11 context. We have to first pay a substantial  
12 amount of money to Arbitron and comScore to  
13 get rated.

14 So it -- I think we also see in  
15 terms of net income it is less -- It is about  
16 half of what we receive. So for example, if  
17 we receive an income of \$2 million, actually  
18 the dollars that we see in our pocket is only  
19 1 million. So that's why it is really  
20 painful, and we really do try to sell  
21 internally, but we just can't.

22 Q When you say you really try to

1 would not want to do so.

2 Q Has Live365 ever not sold ads that  
3 were attainable or available to it, to your  
4 knowledge?

5 A No.

6 Q One last thing, Mr. Lam. In  
7 Paragraph 6 of your written testimony, you  
8 talk about certain listening patterns on  
9 Live365. Are you familiar with a term called  
10 narrow casting, as it has been used by the  
11 RIAA in this proceeding?

12 A I believe so.

13 Q What is your understanding of what  
14 it means?

15 A Well, narrow casing is targeting  
16 just a very small segment of people who are  
17 interested in a certain type of music.

18 Q And you mentioned that Live365  
19 aggregates up to 10,000 stations. Is that  
20 right?

21 A Roughly.

22 Q In response to the assertions by

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1 the RIAA about how services like yours have  
2 the ability to narrow cast and offer thousands  
3 of stations, did you do any kind of analysis  
4 of what, in fact, users do do when they listen  
5 to Live365?

6 **A Yes, we did.**

7 **Q** And can you tell us what that  
8 showed with respect to what the listening  
9 patterns are with respect to the volume of  
10 different channels that consumers actually  
11 listen to?

12 **A We found that, actually, consumers**  
13 **tend to just select very few stations and**  
14 **settle on them. In fact, I think -- let me**  
15 **see an exhibit here. Let me make sure I got**  
16 **the figures out.**

17 **I think we found about 43 percent**  
18 **of the people actually -- We took a sample in**  
19 **April this year for one week. We found that**  
20 **about 43 percent of the people just listen to**  
21 **one station, and then cumulatively speaking,**  
22 **there are about 61 percent of the people who**

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1 **only listen to two stations, and then about**  
2 **78.7 percent of people listen to four**  
3 **stations.**

4 **So that means, actually, a lot of**  
5 **people -- they just settle on something they**  
6 **like and just listen to it.**

7 **MR. STEINTHAL:** I have no further  
8 questions, Your Honor.

9 **CHIEF JUDGE SLEDGE:** Mr. Joseph?

10 **MR. JOSEPH:** Mr. Astle is handling  
11 this witness, actually, Your Honor.

12 **MR. ASTLE:** We have no questions.

13 **CHIEF JUDGE SLEDGE:** Well said.  
14 **Mr. Taylor?**

15 **MR. TAYLOR:** No questions at this  
16 time, Your Honor.

17 **CHIEF JUDGE SLEDGE:** Mr. Smith?

18 **MR. SMITH:** Thank you, Your Honor.

19 **BY MR. SMITH:**

20 **Q** Hello, Mr. Lam. My name is Paul  
21 Smith representing SoundExchange. Nice to see  
22 you.

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1 **A Hello, Mr. Smith.**

2 **Q** As I understand your testimony,  
3 Mr. Lam, it is that Dr. Brynjolfsson went  
4 astray in saying that the information he got  
5 from your documents confirmed the analysis he  
6 had already done using public materials about  
7 the economics of webcasting. Is that correct?

8 **A Yes.**

9 **Q** And you were pretty polite here  
10 this morning, but in fact in your written  
11 testimony you are pretty severe in your  
12 criticisms of Dr. Brynjolfsson, are you not?

13 **A I think, actually, it is about the**  
14 **same, if you choose to say so.**

15 **Q** Well, just so it's clear,  
16 referring to the bottom of page one, the top  
17 of page 2 of your written testimony, you  
18 accuse Dr. Brynjolfsson of grossly  
19 mischaracterizing and misinterpreting the  
20 Live365 data. Do you see that?

21 **A I believe so, yes.**

22 **Q** And you accuse him of improperly

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1 lifting documents from their proper context.

2 **A Yes.**

3 **Q** And misleading the Board by  
4 counting this revenue that you were referring  
5 to, the broadcaster revenue.

6 **A Correct.**

7 **Q** Okay. Now let me start with one  
8 of the areas in which you say Dr. Brynjolfsson  
9 mischaracterized the data. That's the one you  
10 didn't mention this morning, but it is the  
11 first one you mentioned in your written  
12 statement, which is the accusation that Dr.  
13 Brynjolfsson relied on projected revenues and  
14 treated them as if they were actual revenues.  
15 Do you recall making that statement in your  
16 written statement?

17 **A Correct. Correct.**

18 **Q** And the document that Dr.  
19 Brynjolfsson relied on was a document that had  
20 both actual data in it and projections. Isn't  
21 that right?

22 **A Which document you are referring**



1 to, please?

2 Q Let me hand you the document that  
3 is cited by Dr. Brynjolfsson, which has  
4 previously been entered as SoundExchange  
5 Exhibit 23DR. If you would like to check, I  
6 could give you his amended direct testimony,  
7 if you would like, Mr. Lam, to see if this  
8 document that he, in fact, cited. You happen  
9 to have Dr. Brynjolfsson's testimony up there?

10 A No.

11 MR. SMITH: Why don't we pass that  
12 out at the same time. I have marked his  
13 amended testimony, Your Honor, Exhibit 140.  
14 I don't intend to move it into evidence,  
15 because I think it is already testimony  
16 effectively, but just to have the document  
17 number on it.

18 (WHEREUPON, THE DOCUMENT  
19 REFERRED TO WAS MARKED  
20 AS SOUNDEXCHANGE EXHIBIT  
21 NO. 140 FOR  
22 IDENTIFICATION.)

1 BY MR. SMITH:

2 Q Now, Mr. Lam, referring to the  
3 Brynjolfsson amended testimony, first on page  
4 3 you see he cites to Exhibit 23 and discusses  
5 Live365 data.

6 A Correct.

7 Q And that includes reference to  
8 projections as well as actual data?

9 A Yes.

10 Q And that occurs again on pages 17  
11 and 18 of the testimony.

12 A Seventeen and 18 of his testimony?

13 Q Do you want to check that for us  
14 as well? Do you see references there to the  
15 data in Exhibit 23?

16 A Which one is Exhibit 23?

17 Q The one I handed to you. Yes. Do  
18 you see on the top where it says Exhibit 23?

19 A I was looking at the bottom.

20 Okay.

21 Q Do you see those references?

22 A Which references?

1 Q On the bottom of page 17 and the  
2 top of page 18. Do you see them?

3 A Yes.

4 Q Okay. Let me ask you to turn then  
5 to Exhibit 23 itself. That is a document that  
6 was --

7 A Okay.

8 Q That's a document that was  
9 generated at Live365. Right?

10 A Correct.

11 Q And it was generated on December  
12 27, 2005. Do you see the date at the bottom  
13 there?

14 A Yes.

15 Q And it is a summary of economic  
16 performance as well as projections. Correct?

17 A Correct.

18 Q And if you look at the tables,  
19 basically the columns to the left of center  
20 are actual performance, and the columns to the  
21 right of center are projections.

22 A Correct.

1 Q I wonder if you could point to  
2 where it is that you say Dr. Brynjolfsson  
3 treated the projections as if they were actual  
4 data?

5 A The way that I saw the  
6 phraseology, if you look at the -- You know,  
7 if you look at that -- Let's say page 17.

8 Q Yes.

9 A Dr. Brynjolfsson says that  
10 projections through September 2008 when in  
11 many respects Live365 projections are  
12 extremely conservative. For example, they  
13 project only a modest increase in advertising  
14 revenue for 2006, even though by early  
15 February 2006 Live365 already sold more in-  
16 stream advertising than it did for the entire  
17 year of 2005.

18 I'd like to point out that, as I  
19 mentioned earlier, advertising previously was  
20 sold in-house. We had begun only to use  
21 outside agencies sometime in 2005. Okay? So  
22 the number that you see in our projection

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1 there, you know, for 2006 -- right? -- we  
2 projected 1.5 mil. Right? And then it says  
3 that, you know, that by February 2006 we  
4 already had sold more, but as I pointed out  
5 earlier, that gross number is very, very  
6 misleading; because we are actually -- The  
7 revenue that we are generating from using  
8 outside agency net to us is only about half of  
9 that gross number.

10 MR. SMITH: Your Honor, I would  
11 object and move to strike that answer.

12 CHIEF JUDGE SLEDGE: Motion to  
13 strike is granted.

14 BY MR. SMITH:

15 Q Is there anywhere in this  
16 document, Mr. Lam, where Dr. Brynjolfsson  
17 treated projections as if they were actual  
18 data?

19 A We project only -- There is a  
20 mentioning of project only 18 percent increase  
21 in revenue per listening hour from 2005 to  
22 2008. That projection represents a market

1 Professor Brynjolfsson is?

2 CHIEF JUDGE SLEDGE: Mr.  
3 Steinthal, he has characterized Dr.  
4 Brynjolfsson's testimony exactly as Mr. Smith  
5 has asked, and he is asking him to defend his  
6 characterization, his testimony. Your  
7 objection is overruled.

8 MR. STEINTHAL: All right.

9 BY MR. SMITH:

10 Q Is the answer that you can't  
11 identify any place in Dr. Brynjolfsson's  
12 testimony that he ever mischaracterized the  
13 projections as if they were actual data?

14 A Well, the way I read it, based on  
15 the document at page 3, you know, and together  
16 with 17, when I read the thing in totality, it  
17 came across to me as that, you know, he is  
18 relying on the projection in addition to the  
19 actuals.

20 Q These are projections, by the way.  
21 These are projections that you personally  
22 prepared. Correct?

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1 slowing and growing rate. Okay? So he talks  
2 of projection there.

3 Q Does he ever say that -- treat the  
4 projections as if they were actuals and try to  
5 mislead the Board in some way?

6 A Well, that's the way I read it.

7 MR. STEINTHAL: Objection, Your  
8 Honor. There is no reference in his testimony  
9 that the Board was thought to be mislead with  
10 respect to the projections as distinguished  
11 from irrelevant revenues and other issues.

12 CHIEF JUDGE SLEDGE: Overruled.

13 BY MR. SMITH:

14 Q Can you answer the question?

15 A Could you reask the question? I'm  
16 sorry.

17 Q Is there any place in which Dr.  
18 Brynjolfsson tried to mislead the Board by  
19 suggesting that projections were actual data?

20 MR. STEINTHAL: Your Honor, again  
21 how does he know what Mr. Brynjolfsson tried  
22 to do as opposed to what the testimony of

1 A Well, our senior accountant did.

2 Q And did you participate in that  
3 process?

4 A Yes, I did.

5 Q And at the time, you thought they  
6 were the best projections that you could come  
7 up with of the future performance of the  
8 company?

9 A Yes.

10 Q And do you have any problem with  
11 Dr. Brynjolfsson merely stating that the  
12 projections that you produced were consistent  
13 with his prior analysis?

14 A Excuse me. Could you repeat the  
15 question?

16 Q Do you have some problem with Dr.  
17 Brynjolfsson saying that your projections are  
18 consistent with his prior analysis?

19 A Do I have any problem?

20 Q With Dr. Brynjolfsson testifying  
21 that your own projections are consistent with  
22 his prior analysis?

1 A I'm sorry. I just came from the  
2 West Coast, and I'm still trying to wake up a  
3 little bit.

4 Could you reask that question one  
5 more time?

6 Q Do you have a problem with Dr.  
7 Brynjolfsson testifying that your own  
8 projections are consistent with his prior  
9 economic analysis?

10 A You know, his prior economic  
11 analysis, as I read it, he had a very  
12 elaborate economic model and which I didn't  
13 review for this testimony, but I think -- You  
14 know, I think -- What I am saying is, when he  
15 gets into characterizing whatever we produce  
16 as, you know, experiencing a very high  
17 compounded growth, I really have serious  
18 problem with that.

19 Q That is not the issue I am asking  
20 you about. That's the next issue we are going  
21 to get to.

22 A Okay.

1 Fiscal Year. Is that correct?

2 A Let me -- Are you talking about --

3 Q I was referring to the line EBITDA  
4 break even point.

5 A EBITDA, yes.

6 (Whereupon, at 11:49 a.m., the  
7 foregoing matter went into closed session, and  
8 went back on the record at 11:52 a.m.)

9 Q And that was because of some  
10 unusual circumstances in September?

11 A Yes.

12 Q And you anticipate that you will  
13 be in the positive thereafter?

14 A No. Let me explain to you why  
15 that occurred also. We have had -- Okay, we  
16 have a case of fairly substantial turnover in  
17 our personnel. In fact, Mr. Porter who  
18 testified here chose to leave the company. It  
19 was a senior manager who left the company that  
20 we have not replaced. Okay?

21 So those individuals represent a  
22 substantial part of -- in terms of expense.

1 Q Now the question I asked you is do  
2 you have a problem with him really saying that  
3 your projections support his prior analysis?

4 A His prior analysis, meaning his  
5 model one, model two? Which one is it?

6 Q Both.

7 A I would have to actually take a  
8 look at model one and model two to see that,  
9 in fact, is -- because I really don't recall  
10 those models that was performed. It's quite  
11 a while ago.

12 Q Now referring back to Exhibit 23,  
13 these projections that you produced back in  
14 December of '05 -- they are projecting a point  
15 at which you will reach the break even point.  
16 Do you see that in the third line from the  
17 bottom?

18 A Yes.

19 Q And the projection that you  
20 produced then shows that you would go from a  
21 negative cash flow to a positive cash flow  
22 between the '06-07 Fiscal Year and the '07-08

1 So you can see, if you were to look at -- As  
2 we get bigger, instead of bringing in more  
3 people as an ordinary business would do, in  
4 order to survive what we did was we tried to  
5 hold out as long as possible. In fact, in the  
6 case where we felt that we could not, and  
7 tried to recruit people, we made offers to  
8 perspective candidates, even the salaries we  
9 offer we could not recruit people at the rate  
10 that we are offering.

11 CHIEF JUDGE SLEDGE: Mr. Lam, you  
12 gave an explanation, but you did not answer  
13 the question.

14 THE WITNESS: Okay. So he asked  
15 about extraordinary -- are there circumstances  
16 in which, while we have seen better financial  
17 performance.

18 CHIEF JUDGE SLEDGE: Dr. Lam, he  
19 asked you if you broke even in November '05.

20 MR. STEINTHAL: Your Honor, I  
21 believe the last question involved  
22 specifically an extraordinary event in

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1 relation to November '06, and I think the  
2 witness is simply trying to explain what the  
3 extraordinary events were.

4 CHIEF JUDGE SLEDGE: But he never  
5 answered the question.

6 MR. STEINTHAL: I think he is  
7 trying to.

8 CHIEF JUDGE SLEDGE: He gave an  
9 explanation, but he never answered the  
10 question.

11 MR. STEINTHAL: Okay.

12 THE WITNESS: I am sorry. How  
13 would you want me to answer the question?

14 BY MR. SMITH:

15 Q Why don't we withdraw whatever the  
16 last question was, and we will start over and  
17 make it better.

18 Just so it's clear, you were in  
19 the positive on cash flow every month from  
20 November of '05 until September of '06, and  
21 then you show a negative result in September  
22 of '06. Correct?

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1 A Correct.

2 Q Okay. Now if we look at the --  
3 back at Exhibit 23, these projections that you  
4 said Dr. Brynjolfsson shouldn't have relied  
5 on, for the same time period, the October '05-  
6 September '06 Fiscal year, you were at that  
7 point projecting a negative performance of  
8 well over \$300,000 on cash flow. Correct?

9 A Correct.

10 Q And in fact, the way that Fiscal  
11 Year turned out is you were well over  
12 \$300,000 in the positive. Correct?

13 A Correct.

14 Q Okay. Now --

15 A Could I suggest something?

16 MR. SMITH: Your Honor, I would  
17 suggest that we should wait until there is  
18 another question pending.

19 THE WITNESS: Okay.

20 BY MR. SMITH:

21 Q Now let me then turn, if I might,  
22 to this issue of the compound annual growth

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1 rate that Dr. Brynjolfsson calculated. Just  
2 so it is clear, Mr. Lam, you don't have any  
3 quarrel, do you, with the actual calculation  
4 that he made, the 42 percent per year annual  
5 growth rate? I mean, in terms of its  
6 mathematical accuracy.

7 A Based on which page?

8 Q I am referring to your testimony  
9 about the compound annual growth rate that he  
10 calculated, and asking you whether or not your  
11 criticism involves some concern about his  
12 mathematics as opposed to something else.

13 MR. STEINTHAL: You just referred  
14 to Professor Brynjolfsson's calculations. So  
15 if we can just the paragraph of his testimony  
16 that it focuses on.

17 BY MR. SMITH:

18 Q I believe the issue of compound  
19 annual growth rates comes up a couple of  
20 different places, Mr. Lam. Maybe you could  
21 help us find it, since you have testified  
22 about it.

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1 One place is on the top of page 4  
2 in Dr. Brynjolfsson's testimony, Exhibit 140.  
3 Correct? Do you see that, where the growth  
4 rate of 42 percent a year comes up?

5 A Approximately which line? Page 4,  
6 correct, in my rebuttal?

7 Q Fifth line. No, no. I'm asking  
8 you to look at Dr. Brynjolfsson, just trying  
9 to find out where it is he makes these  
10 statements that you are critical of. One is  
11 on the top of page 4. Do you see that, 42  
12 percent?

13 A Yes.

14 Q And another one is on the bottom  
15 of page 17 where he refers to an overall  
16 growth rate of 186 percent for a period of  
17 several years. Do you see that?

18 A Yes.

19 Q Are you testifying today that  
20 there is some inaccuracy with the calculations  
21 that we just referred to?

22 A I am testifying that --

1 Q No. I'm asking you whether you  
2 are testifying that. Is the answer yes or no?  
3 You can answer that yes or no.

4 MR. STEINTHAL: If he could answer  
5 the question without being cut off, I think  
6 that would be fair.

7 CHIEF JUDGE SLEDGE: Please answer  
8 the question, whether that is what you are  
9 testifying.

10 THE WITNESS: What I am  
11 testifying, to whether this number is accurate  
12 or not.

13 BY MR. SMITH:

14 Q Are you saying it is inaccurate?

15 A **It is inaccurate in the sense that**  
16 **it is based on a very small base.**

17 Q I am trying to differentiate  
18 between two things. It seems like this should  
19 be simple. Are you saying there is something  
20 wrong with the way that he did the calculation  
21 or that there is something wrong with the way  
22 he applied the calculation?

1 growth rate is misleading?

2 A **Well, in a sense -- In a real**  
3 **sense, it is, because he is trying to**  
4 **characterize us as a company that is growing**  
5 **at a tremendous rate, where we didn't have**  
6 **enough revenue to pay for the expenses.**

7 Q By the way, just for  
8 clarification, the growth rate that we are  
9 talking about here is not a growth rate in  
10 revenues. It is a growth rate in revenues per  
11 listener hour. Correct?

12 MR. STEINTHAL: Are we referring  
13 to paragraph 4 or paragraph 17?

14 MR. SMITH: You mean page 4?

15 MR. STEINTHAL: Page 4 or page 17  
16 of Professor Brynjolfsson?

17 MR. SMITH: I was referring to  
18 both.

19 BY MR. SMITH:

20 Q Do you recall the question?

21 A **Could you reask the question?**

22 Q The growth rate that we are

1 MR. STEINTHAL: He just said it  
2 was accurate.

3 MR. SMITH: I didn't hear it that  
4 way.

5 CHIEF JUDGE SLEDGE: You heard  
6 something different than I heard.

7 THE WITNESS: No, no, it's  
8 accurate, but it is based on a very small  
9 base.

10 MR. STEINTHAL: right.

11 BY MR. SMITH:

12 Q I appreciate that clarification.  
13 I didn't understand it.

14 Now can you tell me, is there  
15 anywhere in Dr. Brynjolfsson's testimony where  
16 he says that that growth rate -- that he  
17 assumes that that growth rate will continue in  
18 the future?

19 A **I don't remember whether anywhere**  
20 **in his testimony he did or he didn't.**

21 Q Do you think that is an important  
22 thing in deciding that his calculation of that

1 talking about here is the growth rate not of  
2 revenues per se, but of revenues per hour, per  
3 listener hour. Is that right?

4 A **I believe so, yes.**

5 Q Okay. Now in fact, all that Dr.  
6 Brynjolfsson says, referring to the bottom of  
7 page 17, is that the projected 18 percent  
8 increased growth rate seems conservative in  
9 light of the past when the growth rate was 186  
10 percent over a period of years. Is that  
11 right?

12 A **Yes.**

13 Q And you find that deceptive in  
14 some way?

15 A **I have real issues with it.**

16 Q Okay. Now let me ask you then, if  
17 I might, a little bit about this notion that  
18 there is a category of revenue that you think  
19 is irrelevant to these proceedings, and that  
20 is the revenue that you receive from the  
21 people who come to you to webcast essentially.

22 Now if one was trying to decide

1 whether the economic situation of Live365 was  
2 such that it had the economic ability to pay  
3 royalties at a given level, why wouldn't you  
4 want to take into account all forms of revenue  
5 that you have available to you?

6 **A Because the only way to scale a**  
7 **business is where, you know, the users pay for**  
8 **it -- okay? -- the users meaning the listeners**  
9 **who enjoy the music. In the rest of the**  
10 **world, you know, people pay for content, and**  
11 **now -- You know, people had to pay for**  
12 **content, witness Cirius, XM. Everybody pays**  
13 **for content. Okay?**

14 **The reason we are able to derive**  
15 **that revenue at all -- I won't even call it**  
16 **income per se -- is because of the fact that**  
17 **we have spent so much money. We have invested**  
18 **so much money in the infrastructure that, you**  
19 **know, I think it would not be -- You know, I**  
20 **think it would be very appropriate to say that**  
21 **we actually -- every dollar we invest, we are**  
22 **losing money big time. We have tried to**

1 **recoup some of the cost we have put into it.**

2 **Q Well, to return to the subject we**  
3 **were talking about, Mr. Lam, essentially**  
4 **you've found a way to get third parties to do**  
5 **a lot of the programming for you in your**  
6 **webcasting service, and then to get them to**  
7 **pay you money for the opportunity to do the**  
8 **programming. Isn't that right?**

9 **A I think it is an act of**  
10 **desperation. I don't think that's scalable.**  
11 **We already are experiencing actually decline**  
12 **in that as well. On our CB consumer**  
13 **broadcasting, we had hit a limit of roughly**  
14 **6,000 people that pay, and it has not been**  
15 **increasing. In fact, it has been decreasing.**

16 **Q But it is still a substantial**  
17 **chunk of the revenue that you receive?**

18 **A It is consumer and professional,**  
19 **yes, it's about 45 percent, but that is the**  
20 **only way that we could survive.**

21 **Q And in trying to decide what your**  
22 **real economic circumstances are, that is one**

1 of the things you would want to take into  
2 account. Correct?

3 **A As I said, if we want to grow as a**  
4 **company, and in order to recoup the investment**  
5 **we have made, that is not a sustainable model.**

6 **Q Now Dr. Brynjolfsson in his**  
7 **amended testimony, if you have it in front of**  
8 **you, page 3, Footnote 1, actually anticipated,**  
9 **did he not, the possibility that one might**  
10 **want to look at the other categories of**  
11 **revenue and exclude the broadcaster fees. Do**  
12 **you see that?**

13 **A Could you point it out?**

14 **Q It is in Footnote 1.**

15 **A Do you see that?**

16 **A Yes. Okay, let me read it.**

17 **Q Take your time.**

18 **A Okay.**

19 **Q Okay, now what he says there, Mr.**  
20 **Lam, is "I have included the revenues from**  
21 **these other sources in this analysis, as it is**  
22 **unclear which costs should be separately**

1 **attributed to these broadcasting services."**

2 **Do you see that?**

3 **A Yes.**

4 **Q So one of the things you would**  
5 **agree, wouldn't you, if you are going to**  
6 **exclude a category of revenue, you also have**  
7 **to exclude some category of cost to decide**  
8 **whether the remaining parts of the business**  
9 **are profitable or not? Do you agree with**  
10 **that?**

11 **A It's hard to say. It is not**  
12 **necessarily a correlation.**

13 **Q There is not necessarily any**  
14 **correlation between those revenues and --**

15 **A Yes. It depends on the situation,**  
16 **really.**

17 **Q Well, certainly, one of the things**  
18 **we know is that all of your financial**  
19 **documents basically put all the revenues**  
20 **together and all the costs together. For**  
21 **example, Exhibit 23?**

22 **A Correct.**

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1 Q Or Exhibit 141, the month by month  
2 one.

3 A Correct.

4 Q Certainly, those documents  
5 wouldn't give anybody a way to separate out  
6 costs attributable to the broadcasting fees  
7 from costs attributable to the advertising  
8 revenue or the subscription listener revenue.  
9 Correct?

10 A Correct.

11 Q So what Dr. Brynjolfsson said in  
12 that circumstance is, well, I'll leave all the  
13 costs in, and I will leave all the revenues  
14 in, and we will look at how the company  
15 performs, because that's the way the company  
16 reports its performance. Correct?

17 A Correct. At this point in time,  
18 correct.

19 MR. SMITH: Your Honor, at this  
20 point I would like to move into evidence  
21 Exhibit 141, which is the month by month  
22 revenue trend document.

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1 MR. STEINTHAL: Your Honor, I have  
2 no objection to the document coming in. It  
3 does remind me of what I was going to ask  
4 before, which is both this document and the  
5 testimony concerning this document and Exhibit  
6 23DR, SoundExchange Exhibit 23DR which  
7 contains all the columns of actual and  
8 projected revenues, the information about the  
9 actual and projected revenues is clearly  
10 restricted information. It has been  
11 designated as such. It is not public  
12 information. I would move that the documents  
13 themselves and the testimony concerning them  
14 insofar as it relates to figures should be  
15 treated under the protective order.

16 CHIEF JUDGE SLEDGE: Without  
17 objection, Exhibit 141 is admitted.

18 (WHEREUPON, THE DOCUMENT  
19 REFERRED TO, PREVIOUSLY  
20 MARKED AS SOUNDEXCHANGE  
21 EXHIBIT NO. 141 FOR  
22 IDENTIFICATION, WAS

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1 RECEIVED INTO EVIDENCE.)

2 CHIEF JUDGE SLEDGE: Any objection  
3 to applying the protective order to Exhibit  
4 141?

5 MR. SMITH: No, Your Honor.

6 CHIEF JUDGE SLEDGE: Without  
7 objection, the protective order applies to  
8 Exhibit 141.

9 MR. STEINTHAL: Your Honor, there  
10 is the additional issue of the testimony  
11 pertaining to these two documents.

12 CHIEF JUDGE SLEDGE: We are only  
13 dealing with Exhibit 141.

14 MR. STEINTHAL: Well, we had  
15 previously been asking -- Mr. Smith had asked  
16 questions about SoundExchange Exhibit 23DR.

17 CHIEF JUDGE SLEDGE: Those  
18 comments are premature at this point.

19 MR. STEINTHAL: Well, it is  
20 already in, Your Honor. It was attached to  
21 Professor Brynjolfsson's report, which is  
22 restricted. So my only application at this

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1 point is in respect of the questions and  
2 answers that reveal the content of these  
3 restricted materials, it would undermine the  
4 purpose of the protective order if the  
5 testimony concerning Live365's revenues and  
6 projections were not deemed to be covered by  
7 the protective order as well.

8 CHIEF JUDGE SLEDGE: What question  
9 and answer apply to Exhibit 141?

10 MR. STEINTHAL: Your Honor, there  
11 was a series of questions where Mr. Smith  
12 asked about Live365's showing a profit month  
13 to month up until November '06 and questions  
14 about whether the speed of that relative to  
15 what had been projected -- the whole series of  
16 questions and answers about that topic and the  
17 actual numbers that are reported on Exhibit  
18 141.

19 CHIEF JUDGE SLEDGE: Mr.  
20 Steintal, why didn't you raise your concern  
21 with the questions being asked, and the answer  
22 on them?

1 MR. STEINTHAL: I am somewhat  
2 delayed in standing to make the motion, Your  
3 Honor. Once things got started, I didn't want  
4 to interrupt the questioning about the  
5 document, and once Mr. Smith put it into  
6 evidence, I figured I would raise it as to the  
7 document and the questions pertaining to it.

8 CHIEF JUDGE SLEDGE: Any objection  
9 to applying the protective order to the  
10 questions relating to the breaking even in  
11 November '05 and remaining in a positive cash  
12 flow until September '06?

13 MR. SMITH: I have no objection in  
14 principle, Your Honor. It makes it a little  
15 difficult, I think, for the record if we don't  
16 have something more specific for the court  
17 reporter, among others, to know what questions  
18 we are really talking about.

19 CHIEF JUDGE SLEDGE: Because of  
20 that lack of specificity, that's the only part  
21 to which this motion has been applied.  
22 Without objection, that motion is granted.

1 BY MR. SMITH:

2 Q Now let me turn to another topic,  
3 Mr. Lam, which is the issue of Dr.  
4 Brynjolfsson's discussion of advertising  
5 revenue. On the top of page 4 of your  
6 testimony you accuse him of grossly  
7 mischaracterizing the nature of Live365's  
8 advertising revenue. Do you see that, seven  
9 lines down? In your testimony, seven lines  
10 down.

11 A It says that, yes.

12 Q Okay. Now that is because you say  
13 he failed to take into account the commissions  
14 that are paid to the ad rep firms like Ronning  
15 Lipset that sell the ads?

16 A Correct.

17 Q And now turning to Dr.  
18 Brynjolfsson's written amended testimony, page  
19 8, middle of the page, what Dr. Brynjolfsson  
20 did is he specifically said that you had  
21 started using an ad rep from Ronning Lipset.  
22 Correct?

1 A Correct.

2 Q And the statement that he made  
3 there, which is that in the fourth quarter of  
4 2005 alone Ronning Lipset sold more than  
5 double the amount that Live365 had sold in the  
6 entire 13 months prior to hiring Ronning  
7 Lipset Radio. Do you see that statement?

8 A Correct.

9 Q That statement is factually  
10 correct, is it not?

11 A I believe so. I don't have all  
12 the documents here to do the calculation. So  
13 I believe so.

14 Q Now one of the things that Dr.  
15 Brynjolfsson attached to this testimony was  
16 Exhibit 32, already in evidence. Have you got  
17 that there, Mr. Lam?

18 A Yes.

19 Q This is another one of these  
20 monthly revenue trend documents.

21 A Yes.

22 MR. STEINTHAL: Your Honor, if I

1 may, this is another restricted document in  
2 evidence, and to avoid the situation from  
3 before, if there are going to be questions and  
4 answers about the actual contents of the  
5 document, I would move that this portion of  
6 the transcript be restricted.

7 MR. SMITH: Your Honor, until the  
8 question is asked, I don't think it is  
9 appropriate, and I wasn't intending to ask  
10 anything about a number.

11 CHIEF JUDGE SLEDGE: We will wait  
12 to see.

13 BY MR. SMITH:

14 Q Now one of the things that these  
15 monthly trend documents show, Mr. Lam, is the  
16 amount of money that is paid to ad rep firms  
17 for commissions. Correct?

18 A Correct.

19 Q And that shows about ten lines  
20 from the bottom where it says RLR/VCM COMMS.

21 A Correct.

22 Q Is that right? That's the



1 commissions?

2 **A Correct.**

3 **Q** And so this document attached to  
4 Dr. Brynjolfsson's testimony specifically  
5 disclosed the precise amount of commissions  
6 that were being paid in each month to the ad  
7 rep firms. is that right?

8 **A** I think the point he was going to  
9 make here -- I don't know whether it is or it  
10 isn't, but the point he is making there is  
11 that we quickly were able to increase ad  
12 sales.

13 **Q** And the answer to my question is?

14 **A** Is yes and no, because as I said  
15 earlier that we have to basically turn over  
16 half of whatever increase that we get.

17 **Q** And in fact, exactly what you had  
18 to turn over was revealed in Exhibit 32.  
19 Correct?

20 **A** Excuse me?

21 **Q** Exactly what you had to turn over  
22 was revealed in Exhibit 32. Is that correct?

1 this point is: Does Exhibit 32, not the thing  
2 you are looking at but Exhibit 32, reveal the  
3 precise amount of commissions that were paid  
4 during this time period by Live365 for the  
5 ads?

6 **A** It's the amount of commissions  
7 that we have paid. Whether it is precise or  
8 not, because sometimes there are  
9 miscalculations and all that. I think, by and  
10 large, substantially yes.

11 **Q** Okay, thank you.

12 **A** And sometimes we also have bad  
13 debts. We are responsible for our own bad  
14 debts. In fact --

15 **Q** Say that again, Mr. Lam. I'm  
16 sorry, I didn't hear you.

17 **A** There are bad debts, b-a-d d-e-b-  
18 t-s. Okay, in fact, we have substantial  
19 amount of outstanding -- I mean accounts that  
20 have been over 90 days incurred by RLR.

21 **Q** So by putting the commissions on  
22 this Exhibit 32 or on the other revenue trend

1 **A** I don't know whether it's exactly  
2 or not, because it is -- You know, I mean,  
3 reading -- You are asking me to read in  
4 between the lines, I believe.

5 **Q** I'm asking you --

6 **A** All he said was an in-stream --  
7 all the advertising revenue quickly increased.

8 **Q** Yes, but I'm asking about the  
9 contents of this document, Exhibit 32. This  
10 tells you precisely what the commissions were,  
11 does it not?

12 **MR. STEINTHAL:** The witness is  
13 looking at the testimony of Brynjolfsson. So  
14 let's just make sure the question and answer  
15 relate to each other. If the question is  
16 about Exhibit --

17 **THE WITNESS:** Give me a second.  
18 Give me a second.

19 **MR. STEINTHAL:** You're on the  
20 wrong document.

21 **BY MR. SMITH:**

22 **Q** The only question I am asking at

1 document that we looked at, Exhibit 141, what  
2 that does is it actually factors that right  
3 into the bottom line calculations about your  
4 cash flow, does it not, the EBITDA line?

5 **A** Actually, we -- If you are talking  
6 about cash flow, we've got -- Since you asked  
7 the question of cash flow --

8 **Q** Mr. Lam, would you answer my  
9 question, please?

10 **A** Yes, I am answering your question,  
11 please, Mr. Smith. I'm trying to explain this  
12 to you like a businessperson should.

13 **As I said earlier, oftentimes the**  
14 **RLR accounts we cannot collect for over 90**  
15 **days, sometimes 120 days, sometimes longer**  
16 **than that. So you are asking the question**  
17 **about cash flow. Actually, we booked this**  
18 **before we even received the cash, and we had**  
19 **to back them out later on.**

20 **Q** What this document does is it  
21 shows cash in and cash out month by month, and  
22 one form of cash out is the commissions.

1 Correct?

2 **A Correct. But cash in is also --**  
3 **Our cash in actually may look like they are**  
4 **bigger, because we have long term**  
5 **subscriptions, and those, you know, we would**  
6 **collect. For example, for one-year**  
7 **subscription we accrued them on a monthly**  
8 **basis, but we would take the money up front.**

9 Q Now you gave some testimony about  
10 this term narrow casting. Is that something  
11 that you think is a mischaracterization of  
12 what you do?

13 **A I think we are getting into**  
14 **semantics here. I think, in a form, yes, we**  
15 **are narrow casting. I mean, for the people**  
16 **there I think very few people who listen**  
17 **that's narrow casting. Right?**

18 Q That's a description you used of  
19 your own business, isn't it?

20 **A We also have stations where we**  
21 **actually have more people listening as well.**

22 Q My question is the term narrow

1 advertising, what you tell the world is that  
2 what makes Live 365 different from other  
3 webcasters is that you have -- that you narrow  
4 cast. Correct?

5 **A Right.**

6 Q Now I want to ask you a couple of  
7 questions about your Exhibit 1 that you  
8 attached to your testimony. Now is the  
9 purpose of this exhibit to suggest that  
10 somehow you are like terrestrial radio?

11 **A Give me a second.**

12 Q Sure.

13 **A Okay. Will you please reask your**  
14 **question?**

15 Q Is the purpose of this analysis to  
16 show that you, Live365, are like terrestrial  
17 radio in the way you actually operate?

18 **A Not exactly. What we support is**  
19 **to support the statement that actually a**  
20 **certain percentage of our stations get only --**  
21 **I mean, that our listeners, a certain**  
22 **percentage listen to only one station, certain**

1 casting. You used it yourselves to refer to  
2 your own business, have you not?

3 **A Yes, I believe previously, yes, we**  
4 **have referred to that.**

5 Q Handing out what has been marked  
6 as Exhibit 142. Do you recognize this  
7 document, Mr. Lam?

8 **A Yes.**

9 **(WHEREUPON, THE DOCUMENT**  
10 **REFERRED TO WAS MARKED**  
11 **AS SOUNDEXCHANGE EXHIBIT**  
12 **NO. 142 FOR**  
13 **IDENTIFICATION.**

14 Q This is a presentation that was  
15 made by Live 365 in an effort to sell  
16 advertising?

17 **A Correct.**

18 Q And if you refer to page 3 of the  
19 document, Exhibit 142, you see the use of the  
20 word narrow cast. Do you see that?

21 **A Yes.**

22 Q So in fact, in trying to sell

1 **percentage listen to two, and so on and so**  
2 **forth.**

3 Q But you wouldn't suggest that this  
4 analysis in any way undercuts the idea that  
5 your listeners listen to very narrow niche  
6 kinds of stations. Right?

7 **A It really depends. But you know,**  
8 **they listen to -- What we are saying is they**  
9 **listen to -- Oftentimes after they come to us,**  
10 **they would listen to limited number of**  
11 **stations.**

12 Q Right, but those stations might be  
13 very narrow and esoteric stations. There are  
14 just not very many of them in each case for  
15 most users. Right?

16 **A Narrow in what sense?**

17 Q Somebody might listen just to  
18 Spanish classical guitar stations, but there  
19 might just be one or two. Correct?

20 **A In terms of stations or of the**  
21 **persons?**

22 Q The person might listen to very

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1 few stations, but they might still be narrow  
2 niche stations. Is that correct?  
3 **A Yes.**  
4 **Q** Okay. And you have no analysis  
5 that suggests that there isn't a lot of  
6 listening on your service to very narrow niche  
7 stations. Right?

8 **A I believe here the data says that**  
9 **we -- A certain percentage of people listen to**  
10 **-- listeners, right? they listen to just one**  
11 **station, and there are certain people who**  
12 **listen to two.**

13 **Q** But it doesn't tell you anything  
14 about what stations they are listening to.

15 **A No, it doesn't.**

16 **Q** Okay. Now in fact, it is not  
17 true, is it, that your listeners focus on a  
18 very small number of stations. They listen to  
19 a huge range of stations, don't they?

20 **A They have the opportunity to.**

21 **Q** And have you done an analysis of  
22 whether they actually do that?

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1 **A In fact, we are in the process of**  
2 **trying to look into that. I don't think that**  
3 **was previously done in a very scientific**  
4 **method. You know, we have certain hypotheses,**  
5 **but we now are looking at, you know, how we**  
6 **could up our conversions by analyzing such**  
7 **things.**

8 **Q** Well, do you recall making a study  
9 of how many different stations are listened to  
10 on Live365 in a given month?

11 **A Yes. I think we were -- During**  
12 **the proceeding, we were asked certain**  
13 **questions, and our attorneys asked us to pull**  
14 **certain information, I believe.**

15 **Q** Now referring, Mr. Lam, to what I  
16 have marked as Exhibit 143, this is a document  
17 produced at Live365?

18 **A Would you please give me a second?**  
19 **I believe so, but I personally**  
20 **actually did not come across this before.**  
21 **Maybe Mr. David Porter had this prepared**  
22 **before.**

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1 **(WHEREUPON, THE DOCUMENT**  
2 **REFERRED TO WAS MARKED**  
3 **AS SOUNDEXCHANGE EXHIBIT**  
4 **NO. 143 FOR**  
5 **IDENTIFICATION.)**

6 **Q** Okay. Well, you haven't seen this  
7 document. Are you familiar with the fact that  
8 there was a study done of how many different  
9 stations are looked at or listened to in each  
10 month?

11 **A Not this one specifically, but I -**  
12 **- You know, I know different information were**  
13 **pulled during the CRB.**

14 **Q** Is it a fact that thousands of  
15 different stations are listened to by your  
16 listeners every single month?

17 **A Yes, by many listeners.**

18 **Q** Right. And so they are listening  
19 to very, very narrow niche specialized  
20 stations as well as more mainstream stations  
21 every month. Correct?

22 **A I would assume so, yes.**

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1 **MR. SMITH:** Excuse me, if I might,  
2 just a moment.

3 **Nothing further, Your Honor.**

4 **CHIEF JUDGE SLEDGE:** Mr. Smith, I  
5 don't understand what point you are trying to  
6 make with that last question. I guess, since  
7 this -- one of the goals of the testimony, it  
8 is appropriate for me to ask you that.

9 **MR. SMITH:** Sir, I was referring  
10 Your Honor to pages 4 and 5 of Mr. Lam's  
11 written testimony in which he was responding  
12 to the concern raised by our witnesses that,  
13 because of the narrowness and the niche nature  
14 of the stations, they would be much more  
15 likely to substitute for purchases of CDs,  
16 because people could find precisely what they  
17 wanted even to their specific taste; and to  
18 the notion that somehow his Exhibit 1, which  
19 shows that most listeners only listen to a  
20 very few stations, doesn't in any way undercut  
21 the idea that people could go out and find  
22 very niche stations that are specifically

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1 tuned to their particular taste, that would --  
 2 CHIEF JUDGE SLEDGE: and I  
 3 understand that. But what is the relevance  
 4 then of the high number of stations per month  
 5 that attracts listeners?

6 MR. SMITH: The relevance would be  
 7 that it is not as if everybody is listening to  
 8 one mainstream station. They are listening to  
 9 all the niche stations that are available on  
 10 that service. That is a more relevant figure,  
 11 I would submit, than the figure he has put in  
 12 evidence.

13 CHIEF JUDGE SLEDGE: Oh, it took  
 14 me a while to figure it out. So I'm glad I  
 15 asked the question.

16 MR. SMITH: Thank you for the  
 17 opportunity.

18 JUDGE ROBERTS: While we are on  
 19 that topic, Mr. Lam, why has the number of  
 20 stations decreased so dramatically after July  
 21 of 2002?

22 THE WITNESS: Yes. Initially, I

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1 think we start charging broadcasters for using  
 2 our platform. At one point in time, in fact,  
 3 we even had more number than this, a higher  
 4 number than this. So as we start to charge  
 5 people, there are defections of stations and  
 6 that kind of stuff.

7 JUDGE ROBERTS: Thank you.

8 THE WITNESS: That's why I  
 9 mentioned earlier that it is not a sustainable  
 10 model, in the long run, because everybody is -  
 11 -

12 JUDGE ROBERTS: You answered my  
 13 question. Thank you.

14 CHIEF JUDGE SLEDGE: Mr.  
 15 Steinthal?

16 MR. STEINTHAL: Yes, a few  
 17 questions.

18 REDIRECT EXAMINATION

19 BY MR. STEINTHAL:

20 Q Mr. Lam, first of all, take a look  
 21 at Paragraph 2 of your written witness  
 22 statement. Mr. Smith asked you some questions

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1 about where you accused Dr. Brynjolfsson of  
 2 grossly mischaracterizing things, and he asked  
 3 you that question in specific reference to  
 4 projections and whether the projections that  
 5 were given were accurate or not.

6 Is there anything in Paragraph 2,  
 7 and in particular the sentence that Mr. Smith  
 8 quoted at the bottom of page 1, going onto  
 9 page 2, that accuses Mr. -- or Professor  
 10 Brynjolfsson of having grossly  
 11 mischaracterized the projections information?

12 A Could you reask that question?

13 Q I'm asking you whether, in fact,  
 14 as Mr. Smith suggested you did, did you  
 15 actually suggest that Professor Brynjolfsson  
 16 grossly mischaracterized the projections data  
 17 as opposed to other information?

18 A No, I think I said data,  
 19 misinterprets Live365's data.

20 Q You never accused him of  
 21 mischaracterizing the actual projections  
 22 information. Right?

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1 A No.

2 CHIEF JUDGE SLEDGE: I'm sorry,  
 3 Mr. Steinthal. Read that next sentence.

4 MR. STEINTHAL: And there is  
 5 nothing in there, Your Honor, that accuses him  
 6 of grossly mischaracterizing the information.  
 7 The grossly mischaracterizing quote is from  
 8 the prior sentence. It does not relate to the  
 9 projections.

10 CHIEF JUDGE SLEDGE: And this  
 11 sentence begins saying "more specifically."

12 MR. STEINTHAL: And all he says  
 13 about the revenues -- the projections, is that  
 14 the projected revenues are treated as if they  
 15 were actuals.

16 CHIEF JUDGE SLEDGE: And that was  
 17 the point of a lot of Mr. Smith's questions.

18 BY MR. STEINTHAL:

19 Q Well, let me ask you to take a  
 20 look at Professor Brynjolfsson's statement,  
 21 sir. Take a look at page 4, if you will. Is  
 22 this one of the places in the chart on page 4

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1 where Professor Brynjolfsson is setting forth  
2 projections data as part of his presentation?

3 **A Page 4? Okay, what do you want me**  
4 **to look at?**

5 **Q Just Table 1.**

6 **A Table 1. Okay.**

7 **Q Is this a place where you felt he**  
8 **was using the projections information in**  
9 **connection with the setting forth of data?**

10 **A Yes, because he would have to**  
11 **necessarily use the projected Fiscal Year**  
12 **2006-7-8 to arrive at any kind of conclusion**  
13 **or do an analysis.**

14 **Q Mr. Smith asked you a bunch of**  
15 **questions about break even, and you mentioned**  
16 **in response to one of the questions cap ex and**  
17 **EBITDA, E-B-I-T-D-A.**

18 **Can you tell the Board what the**  
19 **impact would be, were you to include in an**  
20 **assessment of the financial circumstances of**  
21 **Live365 what you referred to on the financial**  
22 **documents as cap ex?**

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1 **A Cap ex is capital expenditure. So**  
2 **should I explain the concept of EBITDA? I**  
3 **don't want to insult anybody here. It's**  
4 **earning before interest, tax, depreciation and**  
5 **amortization. Okay?**

6 **Usually, with high tech equipment**  
7 **there is a three-year life depreciation time**  
8 **period. So, for example, if we buy a million**  
9 **dollars worth of equipment, we would have to**  
10 **fully depreciate it in three years, because**  
11 **chances are, by the time three years comes**  
12 **around, they are no longer any good.**

13 **So that's why I put cap ex in**  
14 **there. Remember, this is preserver**  
15 **projection, and we -- instead of using**  
16 **depreciation reflected, we actually charge,**  
17 **say, how much money have we spent, and we are**  
18 **likely to spend -- in fact, last year we spent**  
19 **more money than we projected in cap ex.**

20 **Q And my question is whether, if you**  
21 **include the costs associated with capital**  
22 **expenditure in an analysis of how you are**

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1 doing financially, does that have an effect on  
2 what you would say the company is doing in  
3 terms of how successful it has been?

4 **A Could you reask that question?**

5 **Q Yes. I'm asking what the effect**  
6 **is of taking into consideration your cap ex**  
7 **costs when looking at the financial condition**  
8 **of the company.**

9 **A Yes, it would impact it quite**  
10 **substantially.**

11 **Q In what respect?**

12 **A For example, -- You know, as you**  
13 **know, if you look at this Exhibit -- what is**  
14 **it, 23? -- you notice --**

15 **MR. STEINTHAL: Before you do**  
16 **that, I would move that any testimony you give**  
17 **that you consider to be confidential as to**  
18 **Exhibit 23, which is already in evidence on a**  
19 **restricted basis, be treated as subject to the**  
20 **protective order, Your Honor.**

21 **CHIEF JUDGE SLEDGE: Any**  
22 **objection to applying the protective order to**

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1 his testimony from reference to Exhibit 23?

2 **MR. SMITH: The motion as phrased,**  
3 **Your Honor, was any testimony that Mr. Lam**  
4 **considers confidential. I think that is**  
5 **probably not the right standard.**

6 **CHIEF JUDGE SLEDGE: That's not**  
7 **the way I phrased it.**

8 **MR. SMITH: So that anything he is**  
9 **going to say now would be covered by the**  
10 **protective order?**

11 **CHIEF JUDGE SLEDGE: Anything**  
12 **referencing Exhibit 23 is the motion.**

13 **MR. SMITH: No objection, Your**  
14 **Honor.**

15 **CHIEF JUDGE SLEDGE: Without**  
16 **objection, the testimony derived from**  
17 **referencing to Exhibit 23 is granted.**

18 **THE WITNESS: To make sure that we**  
19 **have the flow, could you ask the question**  
20 **again?**

21 **BY MR. STEINTHAL:**

22 **Q I think the question was what the**

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1 impact would be in assessing the financial  
2 condition of the Live365, were you to take  
3 into consideration the cap ex costs?  
4 **A Okay. Once we take the cap ex**  
5 **into consideration, you know, Mr. Smith's**  
6 **characterization that we would have made money**  
7 **is not accurate. In fact, earlier if we were**  
8 **to look at, for example, go back to Fiscal**  
9 **Year 2002, 2003, you notice that there was**  
10 **very low level of cap ex. That is because the**  
11 **company was losing so much money that no money**  
12 **-- virtually no money was spent on it, because**  
13 **there was no money to spend, and then at that**  
14 **point in time, you know, we tried to do**  
15 **whatever we could.**  
16 **In fact, even the 2004 we spent**  
17 **almost 400,000 in cap ex. That wasn't nearly**  
18 **enough, and 2005 July we had a severe outage,**  
19 **what I call a catastrophic outage. In fact,**  
20 **it could have ended a company's existence.**  
21 **You know, there was a massive**  
22 **problem, because we had deferred replacing the**

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1 **equipment for too long, because we didn't have**  
2 **the money a few years back, and basically, I**  
3 **think if it weren't for the heroic deeds of**  
4 **some of our employees who basically spent**  
5 **their weekends, weekends after weekends,**  
6 **weeknights without sleeping to try to do**  
7 **everything possible, I don't think Live365**  
8 **could possibly be standing today.**  
9 **Q Just one more question, sir, in**  
10 **relation to Exhibit 143 that you were shown at**  
11 **the end of your direct examination with the**  
12 **number of stations that are accessed at least**  
13 **one time in any given month.**  
14 **Judge Roberts pointed you to July**  
15 **31, 2002, where the number of stations was**  
16 **halved literally from July to August. Do you**  
17 **know whether the decision of the Library of**  
18 **Congress at or about that time with respect to**  
19 **webcasting royalties had anything to do with**  
20 **the decline in the number of stations?**  
21 **A Yes, because the rate actually was**  
22 **higher than we anticipated. In fact, it was**

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1 **much higher than what we anticipated. So we**  
2 **really, really had to put a hard cap on -- You**  
3 **know, people wanted broadcasts. They**  
4 **necessarily had to pay or else, you know, we**  
5 **did not see that we could live another day.**  
6 **MR. STEINTHAL: I have no further**  
7 **questions, Your Honor.**  
8 **CHIEF JUDGE SLEDGE: Going back to**  
9 **that motion to apply the protective order,**  
10 **there was no testimony referencing Exhibit 23.**  
11 **So it did not apply to any testimony.**  
12 **Mr. Joseph?**  
13 **MR. ASTLE: No questions, sir.**  
14 **CHIEF JUDGE SLEDGE: Mr. Taylor?**  
15 **MR. TAYLOR: No questions, Your**  
16 **Honor.**  
17 **RE CROSS EXAMINATION**  
18 **BY MR. SMITH:**  
19 **Q Just a couple of questions, Mr.**  
20 **Lam.**  
21 **A Yes.**  
22 **Q I want to refer you to the table**

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1 **on page 4 of Dr. Brynjolfsson's amended**  
2 **testimony that Mr. Steinthal asked you to look**  
3 **at.**  
4 **Do you see the columns that are**  
5 **labeled Fiscal Year 2006, 2007 and 2008?**  
6 **A Yes.**  
7 **Q And those have asterisks on them.**  
8 **What does the asterisk mean?**  
9 **A It means estimated.**  
10 **Q And above that in the text, Dr.**  
11 **Brynjolfsson was very clear in differentiating**  
12 **between the actual data for 2002 through 2005**  
13 **and the projections for thereafter, was he**  
14 **not?**  
15 **A Yes. He had said specifically**  
16 **2002 and 2005 Live365 have increased at a**  
17 **compounded annual rate of 42 percent per year.**  
18 **Q And the next paragraph then talks**  
19 **about the projections for after 2005.**  
20 **Correct?**  
21 **A Correct.**  
22 **MR. SMITH: No further questions,**

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1 Your Honor.  
 2 CHIEF JUDGE SLEDGE: Mr.  
 3 Steinthal?  
 4 MR. STEINTHAL: No further  
 5 questions, Your Honor.  
 6 CHIEF JUDGE SLEDGE: Any questions  
 7 from the bench for Mr. Lam? Thank you, Mr.  
 8 Lam. You are excused.  
 9 CHIEF JUDGE SLEDGE: Mr.  
 10 Steinthal, from the witness list, can I  
 11 believe you are not going to use this  
 12 afternoon for your witnesses?  
 13 MR. STEINTHAL: That is correct,  
 14 Your Honor. We will have two witnesses  
 15 tomorrow, Mr. Fancher in the morning and Mr.  
 16 Nebel in the afternoon.  
 17 JUDGE WISNIEWSKI: Mr. Nebel will  
 18 be available if we finish early with Mr.  
 19 Fancher?  
 20 MR. STEINTHAL: What we are trying  
 21 to do -- Yes, in the morning, and we are  
 22 checking on the availability of one of the

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1 anything here, you might want to take it with  
 2 you.  
 3 MR. STEINTHAL: And might I  
 4 inquire one more housekeeping issue about the  
 5 issue of the timing Thanksgiving week. Are  
 6 you going to require us to submit a motion?  
 7 I just need to advise the Tribunal in the U.K.  
 8 as to when, from a timing perspective, I can  
 9 let them know.  
 10 CHIEF JUDGE SLEDGE: Yes.  
 11 MR. STEINTHAL: Okay. So we will  
 12 need to get something in writing today?  
 13 CHIEF JUDGE SLEDGE: Yes. With  
 14 the factors addressed that we have discussed  
 15 earlier.  
 16 MR. STEINTHAL: Right. Okay.  
 17 CHIEF JUDGE SLEDGE: Thank you.  
 18 Being no other witnesses available for this  
 19 afternoon, we will recess until 9:30 on  
 20 Tuesday.  
 21 (Whereupon, the foregoing matter  
 22 went off the record at 12:41 p.m.)

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1 other witnesses, assuming things go at the  
 2 same speed we are going right now, and we will  
 3 do our best.  
 4 CHIEF JUDGE SLEDGE: It is a shame  
 5 we are wasting this afternoon.  
 6 MR. STEINTHAL: I agree, Your  
 7 Honor, but perhaps it won't be wasted. There  
 8 are other things that we can be doing  
 9 constructively for purposes of the panel.  
 10 MR. LARSON: Your Honor, can I  
 11 ask: On Wednesday you said you have a meeting  
 12 from 1:30 to 3:30. Will we also --  
 13 CHIEF JUDGE SLEDGE: We will break  
 14 from 1:30 to 3:30.  
 15 MR. LARSON: And will we also be  
 16 breaking for lunch at 12:30 to 1:30? So we  
 17 will lose that chunk as well?  
 18 CHIEF JUDGE SLEDGE: I guess so.  
 19 JUDGE WISNIEWSKI: Actually,  
 20 bringing that up, but you should be reminded  
 21 that, since that hearing will also occur in  
 22 this room, if you are concerned about leaving

A				
ability 80:1 98:13	107:8 108:20 109:3	19:15,19 21:19,20	amount 13:17 20:17	50:14,15,20 51:1,6
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